Middleweight Champion, DiBella's and Hopkins's "relationship" would have ended before it ever really started.

DiBella persuaded Hopkins to participate in King's "Middleweight Unification Tournament," assisted him in negotiating with King and contributed one of his "HBO dates" to the Tournament. (App. 5.) He also provided promotional services during the Tournament. For these services, King paid him $700,000. Hopkins defeated the heavily favored Felix Trinidad in the Tournament Championship to become the undisputed Middleweight Champion of the World. (*Id.*)

During the negotiation of the Middleweight Unification Tournament, at DiBella's urging, Hopkins engaged King to serve as his promoter. After the Tournament, King would not commit to involving DiBella in any future fights he promoted for Hopkins. Shut out by King, DiBella turned to Hopkins and offered to continue serving as his advisor in exchange for fifteen percent of his purses. (Trial Trs. 709-10.) Hopkins wanted to continue to work with DiBella, but was unwilling to pay him such a significant share of his future purses. This impasse degenerated into an acrimonious discourse when DiBella insisted that Hopkins "owed" him for getting him into the Tournament, and Hopkins replied that DiBella had been well paid for his services. As the relationship deteriorated, Hopkins became concerned that DiBella was complaining to his former colleagues at HBO that Hopkins was treating him

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championship at all times material hereto. Before the Middleweight Unification Tournament, two other individuals held the Middleweight Championship of the other sanctioning bodies. A fighter is deemed the undisputed champion of a weight class when he holds the title for all major sanctioning bodies.

unfairly. Hopkins perceived that this might harm his ability to obtain future HBO fight dates. (*Id.*, 1005.)

At this point, Arnold Joseph – Hopkins' attorney – had a discussion with Kery Davis, who worked for, and then replaced, DiBella at HBO, about how to mend the rift between Hopkins and DiBella. When Joseph told Davis that DiBella had been paid for everything he did for Hopkins, including a $50,000 payment for the Vanderpool fight, Davis responded that he was surprised because the Vanderpool fight was not one of DiBella's so-called "HBO dates." (*Id.*, 1234-36.) Joseph dutifully reported this conversation to Hopkins, which further inflamed an already deteriorating relationship. (*Id.*, 1001-02.) Based upon Davis's comments, Hopkins concluded that DiBella had acted improperly and misled him when he solicited the $50,000 payment. (*Id.*)

Hopkins was still upset when a reporter, Steve Kim, called him soon thereafter and "spoke what was on his mind" about this matter of private anguish and public concern. (*Id.*, 1002-03.) Throughout most of the interview, Hopkins sought to demonstrate that he had not been unfair to DiBella. (Dx 73.) In an article appearing on Maxboxing.com, Kim attributed the following statements to Hopkins:

> Understand, every time I fought (the past couple of years), Lou DiBella got paid, even when he was with HBO, which is f**king wrong. What I'm saying is that the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO? So the thing is everyone's trying to make Lou this angel and that Bernard Hopkins is a f**kin' dummy because they had nothing to say after I kicked

> Trinidad's ass and they're trying to make me look like the bad guy. So if they want the cat out the bag, then let's let the f**king cat out of the bag.
>
> Ask HBO why an employee of their company asked me to give him $50,000? And I paid him too. Now, is that ethically right? You think Time Warner wants to hear about that? What I'm telling you right now is some serious, serious allegations, but these guys here try to make it seem like I'm the bad guy and Lou is probably whispering stuff around, too, probably, but he probably isn't saying anything openly. And that influence can hurt me when I get to HBO, being friends with the people over there.

(App. 5-6.)

The Kim article sparked interest from other members of the boxing press, who asked Hopkins to clarify his remarks. In articles subsequently appearing in the *Philadelphia Daily News* and *Boston Globe*, Hopkins was either quoted as repeating the substance of his statements to Kim or those statements were requoted. (App. 7-8, 72.) Additionally, in an ESPN Radio interview, Hopkins stated that "I can tell you, one I paid him $50,000 to get on the Roy Jones undercard in Indianapolis to fight Syd Vanderpool or I wouldn't have been on the card . . . " (App. 8.)

## B. Proceedings Below

On December 21, 2001, DiBella and DiBella Entertainment filed a Complaint against Hopkins in the United States District Court for the Southern District of New York asserting defamation and *quantum meruit* claims. Subject matter jurisdiction was vested in the District Court

pursuant to 28 U.S.C. § 1332 because there was diversity of citizenship between plaintiffs, citizens and residents of New York, and Hopkins, a citizen and resident of Delaware, and the amount in controversy exceeded $75,000.

In support of their defamation claims, plaintiffs alleged that the statements attributed to Hopkins in the MaxBoxing.com, *Philadelphia Daily News* and *Boston Globe* articles and statements he made on ESPN radio defamed DiBella because they falsely indicated that he accepted a $50,000 bribe to include Hopkins in the Vanderpool fight. Conceding that Hopkins agreed to pay DiBella $50,000 from the purse he received from the Vanderpool fight while DiBella remained an HBO Senior Vice-President, plaintiffs contended that this payment was nevertheless not a bribe. (App. 73-74.) They maintained that Hopkins agreed to pay DiBella $50,000 in exchange for his promise to provide promotional services to Hopkins and guarantee him future HBO fight dates after he left HBO. (*Id.*) DiBella furthermore claimed to have disclosed his dealings with Hopkins to HBO. However, he admittedly never disclosed that he agreed to accept a $50,000 payment from Hopkins's purse for the Vanderpool fight.[6] (Trial Trs. 533.)

Prior to trial, DiBella stipulated that he was a public figure and, as such, was required to prove constitutional malice by clear and convincing evidence. (App. 11.) In an effort to meet this burden, plaintiffs claimed that the agreement to pay the $50,000 was reached in a meeting in

[6] In the *quantum meruit* claim, plaintiffs alleged that Hopkins had not fairly compensated them for services rendered.

HBO's New York City offices occurring in February 2000 and involving DiBella, Hopkins, Joseph and Magargee. DiBella contended that Hopkins's participation in the Jones/Hall undercard had already been confirmed by this time and, as such, Hopkins could not have understood that the $50,000 payment related to the Vanderpool fight. Hopkins maintained that, to the contrary, the first time paying DiBella a fee was mentioned was during the April 11, 2000 conference call that Arnold and Magargee overheard.

The jury found for DiBella on the claim upon the MaxBoxing.com article and awarded him $110,000 in compensatory and $500,000 in punitive damages. (App. 8-9.) It rendered a verdict for Hopkins on the three other defamation claims DiBella asserted, on the *quantum meruit* claim and on each of the claims that DiBella Entertainment asserted. (*Id.*)

The District Court denied a Motion for Judgment as a Matter of Law and for a New Trial that Hopkins timely filed. Devoting only two pages of its opinion to Hopkins's challenge to the adequacy of the proof of constitutional malice, the District Court summarily concluded that Hopkins "had to have known the statements were false . . . " (App. 52.) The District Court ruled that, in rejecting Hopkins's truth defense, the jury could have concluded that the April 11, 2000 conference call never took place. (App. 53.) It held that a jury could infer malice from this conclusion. (*Id.*)

Immediately after the judgment was entered, DiBella appealed the verdicts on the defamation claims decided adversely against him. After the District Court entered its

decision on the post-trial motions, Hopkins timely filed a cross-appeal. In his cross-appeal, Hopkins maintained that DiBella had failed to demonstrate that any of the factual statements Hopkins had made were false and that any assertions attributed to him to the effect that DiBella's conduct was unethical, improper or criminal were constitutionally protected statements of opinion. Hopkins also asserted that DiBella had not proven constitutional malice by clear and convincing evidence because the testimony he offered on this issue was vague, not clearly remembered and inconsistent with contemporaneous exhibits and admitted facts. He further argued that DiBella did not submit any evidence that Hopkins knew at the time he was interviewed by the press any of the circumstances, such as his disclosures to HBO, that supposedly justified his conduct.[7]

By Decision entered April 4, 2005, the Second Circuit Court of Appeals affirmed the judgment on both the appeal and cross-appeal. The Second Circuit eschewed the District Court's conclusions that the jury could infer malice from its rejection of his truth defense. It, instead, ruled that:

> DiBella's testimony and the testimony of HBO executives, however, painted a completely different picture [from the statement Hopkins made]:

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[7] In any event, DiBella's conduct was unethical even if his justifications are taken at face value. It is simply improper for a company employee to negotiate with an individual for his own personal benefit at the same time he is negotiating with this individual on behalf of the company. Acting in this dual capacity, at the very least, risks causing the individual with whom the employee is negotiating to be concerned that he will not obtain a valuable contract with the company if he is not amenable to the employee's offer in his personal capacity.

> the payment was not surreptitious, was not made while DiBella was still employed at HBO, did not have anything to do with Hopkins getting on the undercard, and Hopkins was aware of the true facts when he made his statements to Kim. Thus, the jury heard significantly different accounts of what transpired between Hopkins and DiBella, and it was entitled to believe some witnesses and discredit others. The jury by its verdict found that DiBella and his witnesses were credible and that Hopkins was not.
>
> Hopkins was present when Joseph offered to pay DiBella $50,000 on May 19, 2000, and Hopkins also knew that DiBella was actually paid in January 2001. Hopkins thus knew the payment was not made while DiBella was still employed at HBO. Hopkins knew or should have known that the payment was for future services that DiBella intended to perform for Hopkins once DiBella left HBO, not as a *quid pro quo* for getting on the Jones-Hall undercard.

(A-24.)

On April 18, 2005, Hopkins timely filed a Petition for Rehearing *En Banc* or for Reargument before the Panel. He argued that the Second Circuit had failed to exercise the level of independent review of the jury's malice determination required by long standing precedent of this Court. Hopkins noted the divergence even within the Second Circuit as to the level of review necessary to comply with this Court's mandate to exercise "independent review" of whether a public figure plaintiff had proven constitutional malice. The Second Circuit denied this Petition by Order entered June 1, 2005 and without opinion. (App. 80.) However, by Order dated June 29,

2005, the Court granted Hopkins's subsequent Motion to Stay the Issuance of the Mandate pending a Petition for a Writ of Certiorari. (App. 81-83.)

## REASONS FOR GRANTING CERTIORARI

### A. The Court Should Grant Certiorari To Resolve the Long-Standing Split Among And Within the Circuits As To The Proper Scope Of Review Of Whether A Public Figure Plaintiff Has Proven Constitutional Malice

Rule 10 of the Supreme Court Rules provides that a writ of certiorari may be issued where a court of appeals has entered a decision in conflict with the decision of another circuit court on the same important matter or has resolved an issue that has not been, but should be, settled by the Supreme Court or is of the character warranting Supreme Court review. Rule 10(a) and (c) of the Supreme Court Rules. Both criteria are satisfied here because the Second Circuit did not exercise the scope of review on a constitutional issue mandated by this Court's long-standing precedent, and found appropriate by many other Courts of Appeal and state appellate courts.

It was, of course, determined in the seminal case of *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964), that public officials must prove actual malice to recover in a defamation claim. This requirement was imposed to assure that damages are not awarded against a party for engaging in constitutionally protected speech. It is now well-settled that the obligation to prove constitutional malice extends to all public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Curtis Publishing Co. v.*

*Butts*, 388 U.S. 130, 155 (1967) (plurality opinion). To avoid chilling the exercise of constitutionally protected speech with the specter of unwarranted defamation claims, a public figure plaintiff must also prove constitutional malice by clear and convincing evidence. *Gertz*, 418 U.S. at 342.

Malice is a subjective standard that focuses on the defendant's state of mind. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). It is defined as the making of a statement with knowledge of its falsity or with a subjective awareness of its probable falsity. *Id.* A plaintiff cannot prove malice through evidence that the defendant "should have known" his statement was false or otherwise failed to exercise due care. *Gertz*, 413 U.S. at 335 n.6.

Whether a plaintiff has submitted evidence sufficient to meet his constitutional burden of proof is a question of law the court must address. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). A court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984). *See also, New York Times v. Sullivan, supra* at 285 (1964) (a "reviewing court must make an independent examination of the whole record . . . so as to assure that the judgment does not constitute a forbidden intrusion on the field of free expression") (citations omitted). As was noted in *Bose*, "[t]he simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." 466 U.S. at 522 n.27. While this principle is firmly established, the scope of this review and whether it extends to assessing the weight of the evidence and the inferences that may be drawn therefrom has remained unsettled for years and

been the subject of disagreement among and within the Circuits.

What appears to be a majority of the circuits have ruled that an appellate court's duty to review the record *de novo* requires that it independently weigh the evidence and evaluate the inferences to be drawn from the historic facts. *See e.g.*, *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority*, 148 F.3d 242, 247 (3d Cir. 1998) ("[t]his independent duty . . . require[s] us to draw our own inferences from the factual evidence presented"), *cert. denied*, 525 U.S. 1068 (1999); *In re IBP Confidential Business Litigation*, 797 F.2d 632, 643 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999) ("[m]ost courts show less deference when factfinding 'rel[ies] on weighing evidence and drawing of inferences"), *cert. denied*, 528 U.S. 1198 (2000). *See also*, *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 120 (Tex. 2000) ("[i]t is not enough for us, therefore, to determine that a reasonable jury *could have found* that Dolefino acted with actual malice") (emphasis in original).

A minority of circuits apply a more limited review. For instance, in *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997), the Court found that no special review is accorded to "preliminary factual issues." *Accord, Reuber v. Food Chemical News, Inc.*, 899 F.2d 271, 279-80 (4th Cir.) (reviewing all the evidence from viewpoint of the inferences permitted to the jury), *vacated*, 922 F.2d 197 (4th Cir. 1990), *reh'g*, 925 F.2d 703 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991).

The positions adopted even within circuits have often been the subject of significant dissent. Most recently,

eleven judges of the Ninth Circuit dissented from the denial of *en banc* review of a panel's reversal of summary judgment in favor of *Consumer Reports* in a product disparagement action. *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1110 (9th Cir. 2003), *cert. denied*, 540 U.S. 983 (2003). The panel held the District Court had improperly weighed the evidence in holding that the plaintiff could not prove malice. The dissenting judges argued that weighing the evidence is precisely what a court must undertake as part of its independent review of the record.

> After resolving the predicate factual disputes in the plaintiff's favor, however, the judge must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." And *that* process is not a routine sufficiency determination, because it *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.

*Id.*, at 1113-14 (emphasis in original) (citations and footnotes omitted). *See also, Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987).

Moreover, in *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612 (2d Cir. 1988), unlike in the pending action, the Second Circuit engaged in a searching scrutiny of the record in affirming summary judgment for the defendant. However, the same Court employed a narrower scope of review in *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163 (2d Cir. 2000), which Judge Jacobs in dissent argued was in error:

> With respect, I must say that the majority opinion recites the duty of independent examination

> without performing it. The majority opinion holds only that the evidence is sufficient to convince a reasonable juror, but fails to recognize that evidence sufficient to convince a reasonable juror is not enough. . . .

*Id.*, at 193.

Scholars have also repeatedly commented upon this ongoing conflict. Sack, Robert D., *Sack on Defamation: Libel, Slander and Related Problems*, Vol. 1, § 1.11, p. 1-47 (3rd Ed. 2002) ("[w]hat 'independent examination' means – to what extent it trumps traditional deference to a trial court's fact-finding – is not clear"); Smolla, Rodney A., 2 *Law of Defamation*, Vol. 2, § 12.86, p. 12-75 (West Pub. 2d Ed. 2004) ("[a]n intense debate has begun to develop over how traditional deference owed to jury verdicts is to be meshed with the more searching independent review mandated by *Bose*"); Silak, Cathy R., *The Independent Examination Rule in the Ninth Circuit: Suzuki Motor Corp. v. Consumers Union*, 40 Idaho L. Rev. 445 (2004).

In opposing Hopkins's Motion to Stay the Issuance of the Mandate, DiBella argued that there is no divergence of view within the Circuits because they uniformly recognize the obligation to conduct an independent review. However, it is not in the articulation of the standard, but in its application, where there is divergence. Even a cursory review of the cited decisions reveals that the Courts of Appeal are at odds as to what the scope of this review should be. Should the court analyze the quality, consistency and weight of the evidence? Or, conversely, should the court defer to the jury's fact finding?

It is immaterial that in some of these decisions the courts were considering the scope of review in the context

of a summary judgment motion. Although the issue in a summary judgment motion is whether a jury could conclude that the defendant acted with constitutional malice, while the issue on post-trial motions is whether the jury did properly conclude that the defendant acted with the requisite intent, the fundamental question is the same – is there adequate evidence in the record to support the conclusion with convincing clarity that the defendant's statement was made with knowledge of its falsity or a subjective awareness of its probable falsity.

As the standard of review of whether a public figure plaintiff has proven constitutional malice implicates defendants' constitutional rights, this issue warrants Supreme Court review. *See e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967) ("[t]he dissemination of [an] individual's opinions on matters of public interest is . . . in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure'") (plurality opinion). The divergent views on this crucial issue have continued for an extended period and, it should, accordingly, be clear that Circuit Courts of Appeal will not reach consensus upon further consideration. Moreover, this issue has percolated at the Circuit Court level long enough for all views on the issue to be developed given the number of decisions considering the scope of review of whether a public figure plaintiff has proven constitutional malice. *Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 768 (11th Cir. 2004) (Tjoflat, J., dissenting), *quoting*, Strauss, Peter, L., *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L.Rev. 1093, 1109 (1987). For this reason, it is respectfully submitted the Court's prior

denials of *certiorari* on the issue presented for review actually militate in favor of granting *certiorari* here to resolve an issue that has bedeviled the Circuit Courts of Appeal.

### B. The Court Should Grant Certiorari to Rule That Independent Judicial Review Encompasses An Examination Of The Entire Record To Determine Whether The Evidence Was Of Sufficient Weight And Consistency To Support The Jury's Verdict

A critical analysis of the record is mandated by this Court's direction to conduct an independent, *de novo* review. *Bose Corp. v. Consumers Union of U.S., Inc., supra.* By definition, "independent" review is one that is not determined or influenced by someone else. *American Heritage College Dictionary,* Houghton Mifflin (Fourth Edition 2002). It is furthermore well-settled that *de novo* review requires an appellate court to review an issue as if for the first time, without deference to the decision in the court below. Deferring to the jury's determination accordingly is inconsistent with the requirement of independent, *de novo* review.

It also impinges upon fundamental rights by affording juries too much latitude in determining whether the defendant's statements are constitutionally protected and by denying the defendant meaningful judicial review. This is a crucial concern because "'the evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case.'" *Tavoulareas v. Piro,* 817 F.2d 762, 807 (D.C. Cir. 1987) (Ginsberg, J. concurring), *quoting, Ollman v. Evans,* 750

F.2d 970 (D.C. Cir. 1984) (Bork, J. concurring). *See also*, Note, *Punitive Damages and Libel Law*, 85 Harv. L. Rev. 847, 860 (1985) (jurors have considerable trouble "distinguishing actual malice from mere negligence").

Appellate review, consisting of an analysis of whether there is sufficient evidence in the record from which a jury could reasonably have concluded that the defendant acted with constitutional malice, is no different than the standard applied to a post-judgment sufficiency of the evidence challenge in any civil case. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (in reviewing motion for judgment as a matter of law, "court must draw all reasonable inferences in favor of the non-moving party and it may not make credibility determinations or weigh the evidence"). Independent appellate review must mean a more searching analysis than what is applied in a case where constitutional rights are not at stake. *Suzuki Motor Corp. v. Consumers Union of the U.S., Inc.*, *supra*, 330 F.3d at 1114-1115 (Kozinski, J., dissenting).

The burden of proof imposed upon public figure plaintiffs also mandates more than a deferential review of the jury's verdict. While there is a surprising dearth of cases defining what constitutes clear and convincing evidence, it has been recognized to be that quantum of proof demonstrating a high degree of probability the position advocated is true. *See, United States v. Gustafson*, 728 F.2d 1078, 1083 (8th Cir.), *cert. denied*, 469 U.S. 979 (1984); *Edo Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1454 (10th Cir. 1990). To satisfy this burden, testimonial evidence must be specific and based upon clear recollection; evidence of a vague and uncertain character is insufficient. *Id.* Under this standard, the question presented is not whether there is sufficient evidence in the

record from which a jury could have concluded that the defendant acted with constitutional malice. *The question is whether there is evidence in the record of sufficient consistency and certainty to convince a jury clearly and convincingly that the defendant knew his alleged defamatory statements were false or made them with a subjective awareness of their falsity.*

This inquiry of necessity requires an examination of the weight of the evidence. An appellate court should not assume the truth, for instance, of testimonial evidence that is vague or not clearly remembered, self-contradictory or inconsistent with contemporaneous documents or admitted facts. Rather, it must assess whether the proffered testimony is sufficiently compelling so that a reasonable juror could be clearly and convincingly persuaded of its accuracy regardless of how credibly the witness testified. Witnesses only appear before a jury for a limited time and there is only so far the jury's ability to observe their demeanor and manner of testifying – the only advantages a jury has over a reviewing appellate court – can go to support a verdict. While a jury may find a witness believable based on his demeanor, it could not have sufficient confidence in this assessment to be persuaded to a high probability of the truth of his testimony if the witness has a poor recollection or offers an account inconsistent with admitted or well-established facts.

Independent judicial review of malice also requires an analysis of the validity of the factual inferences the jury likely made. Constitutionally protected speech should not be invaded based upon inferences that are not logically drawn from, and well-grounded in, the evidence. To conclude otherwise would likely dampen an individual's

willingness to criticize a public figure even if he or she believed that the criticism was true out of concern that the public figure may prevail in a defamation claim "by creating doubt in the juror's minds as to the truth of [a particular] statement" and by raising concerns about the defendant's credibility. Franklin, Marc A. & Bussell, Daniel, J., *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 864 (1983).

Courts adopting a deferential scope of review have reasoned that it is compelled by the right to a jury trial. This Court has, however, already addressed this concern in mandating an independent, *de novo* review of whether the plaintiff proved constitutional malice. *New York Times v. Sullivan*, *supra*, 375 U.S. at 285 n.26 (court will "'review the findings of fact . . . where a conclusion of law as to a Federal Right and a finding of fact intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts'"), *quoting Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927). Although reviewing a judgment entered after a non-jury trial, this Court ruled in *Bose Corp. v. Consumers Union of U.S., Inc.*, *supra*, that:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

466 U.S. at 523. The right to a jury trial only extends to factual issues. It accordingly does not invade a public

figure plaintiff's right to a jury trial for an appellate court to fulfill its constitutional duty to determine if the evidentiary record supports the conclusion that the defendant acted with the requisite intent.

### C. This Case Squarely Presents The Issue Of The Scope Of Review Because The Second Circuit Exercised A Limited Review And There Are Substantial Questions As To The Sufficiency Of The Evidence Of Malice

The Second Circuit accepted the jury's verdict at face value, drew all inferences in DiBella's favor and concluded only that there was a reasonable basis for the jury's verdict. (App. 24.) The Court therefore failed to exercise the scope of review that Hopkins advocates should be employed, and that has been employed by the majority of Circuit Courts of Appeals. *See e.g., McKinley v. Baden*, 777 F.2d 1017, 1022 (5th Cir. 1985) ("[w]e do not disturb its [the jury's] credibility choice. After our independent review of the record, however, it is our judgment that the record fails to establish malice with 'convincing clarity' ").[8] It is actually difficult to distinguish between the scope of review the Second Circuit utilized and the traditional sufficiency of the evidence standard of review applicable to a post-trial challenge to the sufficiency of the evidence in any other civil action. *Reeves v. Sanderson Plumbing Products, supra.*

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[8] By holding that DiBella proved malice because "Hopkins knew or should have known that the payment was for future services," (App. 25), the Second Circuit also applied the wrong standard by allowing for the possibility that Hopkins was held liable for mere negligence. *Gertz v. Robert Welch, Inc., supra*; *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 182-83 (2d Cir. 2000).

Not only did the Second Circuit fail to analyze the sufficiency of the evidence of malice, it did not even identify what this evidence was other than to note that Hopkins knew the $50,000 was not paid after DiBella left HBO. However, Hopkins never claimed that he paid the $50,000 before DiBella left HBO. More importantly at this stage of the proceedings, a defendant may not be held liable upon a defamation claim if his statements are substantially true. *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987). Where the sting of a defendant's statements is no different than the actual truth, they are not actionable. *See Green v. CBS, Inc.*, 286 F.3d 281, 285 (5th Cir. 2002), *cert. denied*, 537 U.S. 887 (2002); *Cobb v. Time, Inc., d/b/a Sports Illustrated*, 278 F.3d 629, 639-40 (6th Cir. 2002), *cert. denied*, 537 U.S. 878 (2002). It simply cannot reasonably be argued that it would have been appropriate for DiBella to agree to a $50,000 payment as a fee for Hopkins's participation in the Vanderpool fight so long as the money was not paid until after he left HBO. As such, the sting of Hopkins's statement would have been no different if he had inaccurately claimed the money was paid while DiBella remained at HBO.

The Second Circuit seems to have concluded that, if the jury found that DiBella asked for the $50,000 payment in consideration of his commitment to work with Hopkins after he left HBO, it could also find that Hopkins must have known the true purpose for this payment because he participated in the conversation. This would be true only if the circumstances of the conversation were so clear that there could have been no misunderstanding. *See Mahoney v. Adirondack Publishing Co.*, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 71 N.Y.2d 31 (N.Y. Ct. App. 1987) (judgment

as a matter of law in coach's defamation claim based on reporter inaccurately characterizing statements he heard coach make where there was no evidence to negate the possibility that the reporter misunderstood the coach). Assuming the agreement to pay the $50,000 was made as DiBella claims, the circumstances under which Hopkins agreed to make this payment were far from clear and, instead, "bristled with ambiguities." *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).

Even under the Second Circuit's recitation of the facts, Hopkins could still have understood that the $50,000, which admittedly was to be made from the purse for the Vanderpool fight, was a fee for participating in that event because DiBella solicited this payment while he was employed with HBO and retained responsibility for the televised undercard to the Jones/Hall fight. As is previously set forth, under DiBella's version of events, the $50,000 was paid, in part, to secure DiBella's guarantee of future HBO fight dates and DiBella affirmatively alleged in the Complaint that it had initially been discussed that what became the Vanderpool fight would be broadcast on the first "date" HBO provided DiBella after he left the Company.

The only basis cited by the Second Circuit and offered at trial by DiBella for the conclusion that Hopkins could not have actually misunderstood DiBella's intentions was the conclusion that the agreement to pay the $50,000 was reached in February 2000 after Hopkins was signed to the undercard. This conclusion squarely presents the issue of whether the Second Circuit would have been required to reverse if it had undertaken a more searching inquiry of whether the evidence was competent to support this conclusion. Hopkins submits that the jury could not have

concluded with convincing clarity based upon the evidence presented at trial that the agreement to pay the $50,000 was reached in February 2000 or after Hopkins was signed to the Vanderpool fight. As an evidentiary analysis is premature at this point given that the trial record is not before the Court, it is simply noted that DiBella surprisingly claimed (given this was the first fighter signed by his new business) only a vague recollection of the alleged February 2000 meeting in New York with Hopkins, Joseph and Magargee where the agreement to pay the $50,000 was supposedly reached. (*See e.g.*, Trial Trs. 517-519.) Hopkins also offered contemporaneous documentation into evidence demonstrating that Joseph was not and could not have been in New York City at any time in late January or February 2000. (Dx 72.) Hopkins also introduced documentary evidence that the negotiation of Hopkins's participation in the Vanderpool fight began in March 2000, and he never actually signed an agreement to participate in this fight.[9] (Dx 79.)

It is also noted that the jury's inconsistent verdicts on the four defamation claims certainly raises substantial questions as to whether DiBella proved constitutional malice. While each of these claims was based upon a different publication, as noted previously, the same statements are attributed to Hopkins in each and the *Philadelphia Daily News* article was likely based on the Kim article. There is simply no reasonable basis to conclude that the statements attributed to Hopkins in the

[9] The fight promoter insisted that Hopkins agree to fight another fighter he promoted after the Vanderpool fight on terms unacceptable to Hopkins. This issue continued until the night of the fight.

Kim article were defamatory if the statements in the other publications were not. *DiBella v. Hopkins*, 285 F.Supp. 2d 394 (S.D.N.Y. 2000) ("[s]tatements similar to the statements quoted in the Kim article were published in other newspapers and on the radio, attributed to Hopkins"). (App. 45.) This discrepancy cannot be explained by the suggestion that the jury questioned whether Hopkins was accurately quoted in the other publications because the tape of the ESPN radio interview was played for the jury. (App. 47.) Moreover, the Second Circuit completely ignored the undisputed testimony that Davis expressed surprise when told that DiBella had been paid $50,000 from Hopkins's purse for the Vanderpool fight.[10]

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[10] The District Court's conclusion that malice may be inferred simply from Hopkins's defense of the truth of his statements or if the jury concluded that he falsely testified that there was a telephone call in April 2000 during which the agreement to make the $50,000 payment took place is of no significance. The Second Circuit did not adopt this conclusion and declined DiBella's request to tax all costs against Hopkins because, among others, of the alleged improper suppression of evidence. (App. 77-79.) The District Court's conclusion is also inconsistent with this Court's express holding in *Bose Corp. v. Consumers Union of U.S., Inc., supra*. Additionally, the District Court's conclusion was based on the redaction of an entry from an attorney time sheet that occurred at a point in the case when DiBella had not raised any issue as to the timing of the agreement to pay the $50,000. In fact, it was undisputed that DiBella first claimed that the agreement to pay the $50,000 was reached in a February 2000 meeting in New York when he surprised Hopkins with this assertion at trial. (Trial Trs. 799-811.)

## CONCLUSION

The Court should grant a writ of certiorari to settle a long standing split among and within the Circuit Courts of Appeal as to what scope of review must be undertaken in order to comply with the requirement for independent, *de novo* review of whether a public figure plaintiff has proven constitutional malice by clear and convincing evidence in this case where the Second Circuit Court of Appeals erroneously conducted a limited review and the issue is squarely presented.

Respectfully submitted,

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Dated August 30, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 2004

(Argued September 27, 2004 Decided: April 4, 2005)

Docket Nos. 03-7012, 03-9095

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LOU DIBELLA and
DIBELLA ENTERTAINMENT, INC.,

*Plaintiffs-Appellants-Cross-Appellees,*

v.

BERNARD HOPKINS,

*Defendant-Appellee-Cross-Appellant.*

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Before:

CARDAMONE, McLAUGHLIN, and WESLEY,
*Circuit Judges.*

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Plaintiff Lou DiBella appeals from a judgment of the United States District Court for the Southern District of New York (Chin, J.), entered on December 2, 2002, finding that three statements made by defendant Bernard Hopkins did not amount to libel against plaintiff. Plaintiff seeks a new trial. Plaintiff also submits a motion to strike defendant's request to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 28(j). Defendant cross-appeals from the same judgment insofar as it found that another of his statements amounted to

libel against plaintiff. He also challenges several evidentiary rulings as well as the amount of compensatory and punitive damages awarded plaintiff. Defendant seeks to have the jury's verdict set aside and judgment entered in his favor.

Judgment on appeal and cross-appeal affirmed; plaintiff's motion to strike granted.

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STEPHEN A. COZEN, Philadelphia, Pennsylvania (Robert W. Hayes, Marlo Pagano-Kelleher, Cozen O'Connor, P.C., Philadelphia, Pennsylvania; Edward Hayum, New York, New York, of counsel), *for Defendant-Appellee-Cross-Appellant.*

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CARDAMONE, *Circuit Judge:*

Plaintiff Lou DiBella sued defendant Bernard Hopkins, a former business associate, for libel. DiBella alleged that Hopkins made four libelous statements about him. After a jury trial in the United States District Court for the Southern District of New York before Judge Denny Chin in November 2002, the plaintiff was awarded a substantial verdict based on one of Hopkins' libelous statements. DiBella appeals from the judgment of that award entered December 2, 2002, on the grounds that the jury did not find that Hopkins' other three statements were libelous. Defendant cross-appeals from the same judgment challenging several evidentiary rulings, the

amount of compensatory and punitive damages awarded plaintiff, and the finding that one of the allegedly libelous statements actually amounted to libel. By its verdict, the jury confirmed the insightful truth that "he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed." William Shakespeare, Othello, act 3, sc. 3, l. 159-61 (W.J. Craig ed., Oxford Univ. Press 1928). For the reasons set forth below, we affirm.

## BACKGROUND

### A. *The Business Relationship Between Plaintiff and Defendant*

Plaintiff DiBella, a former executive with the cable network Home Box Office (HBO), was a "principal architect" of HBO's successful boxing programming. He is now the head of DiBella Entertainment, Inc., an independent boxing promotions and television packaging company. Defendant Hopkins is the current undisputed middleweight boxing champion of the world, holding titles from the International Boxing Federation (IBF), the World Boxing Association (WBA), and the World Boxing Conference (WBC).

DiBella began negotiations to terminate his employment contract with HBO in January 2000. On May 12, 2000 DiBella and HBO executed a final termination agreement. Under that agreement HBO agreed to give DiBella several HBO "dates" for broadcasting fights he arranged. Such dates are extremely valuable because appearing in a fight on HBO – a venue that gives a boxer significant public exposure – is considered a pinnacle of success in the boxing world.

While DiBella was still with HBO, another HBO executive recommended that he put Hopkins (then the IBF middleweight champion) on the "undercard" of an upcoming middleweight fight between Roy Jones and Richard Hall. DiBella agreed and put Hopkins on the undercard, allowing Hopkins to fight on HBO immediately before the Jones-Hall "main event."

After signing Hopkins to the undercard, DiBella initiated discussions with him about representing and promoting Hopkins after DiBella left HBO. In February 2000 the parties concluded a handshake agreement. DiBella agreed to advise Hopkins and assist in marketing him. Hopkins agreed to pay DiBella $50,000 as an advance fee for services that DiBella was expected to perform once he left HBO. The jury found that the $50,000 fee was not in consideration of HBO's decision to put Hopkins on the Jones-Hall undercard. Moreover, senior executives at HBO – including HBO's senior counsel, general counsel, and the head of HBO Sports – were aware of DiBella's contacts with Hopkins and had no objection to them. In late March or early April 2000 – while still an HBO employee – DiBella agreed to advance Hopkins a $30,000 interest-free loan to cover Hopkins' training expenses. HBO executives were also advised of this loan and did not object to it.

DiBella officially left HBO employment on May 12, 2000. Hopkins fought in the undercard fight on May 13 and defeated his opponent, Syd Vanderpool. Hopkins and his lawyer, Arnold Joseph, Esq., met with DiBella on May 19, 2000, at which time Hopkins repaid DiBella the $30,000 loan and prepared a check for $50,000 as payment to DiBella of the advance marketing fee. Issuance of the check was deferred because DiBella was a potential witness in a lawsuit pending in the United States District

Court for the District of Colorado (Kane, J.), brought by Hopkins' former promoter America Presents, Ltd. (*America Presents, Ltd. v. Hopkins* or *America Presents*), and Hopkins' lawyer wanted to avoid the appearance of paying a witness.

Upon leaving HBO, DiBella went to work advising Hopkins on his public image and negotiating future fights for him. This included a fight with Antwun Echols in December 2000 that was broadcast on HBO using one of DiBella's valuable HBO dates. Hopkins won that fight and paid DiBella the $50,000 marketing fee in January 2001. DiBella then began negotiations with famed boxing promoter Don King to arrange a middleweight title unification match between three of King's fighters (William Joppy, the WBA title holder; Keith Holmes, the WBC title holder; and Felix Trinidad, a celebrated middleweight boxer) and Hopkins, the IBF title holder. DiBella agreed to use another of his HBO dates to broadcast this tournament. He also pressed Hopkins to accept a long-term contract with King, which King had made a precondition to agreeing to the match. Hopkins eventually signed a contract with King and the tournament was held on September 29, 2001. Hopkins won and became the undisputed world middleweight champion.

### B. *The Defamatory Statements*

During the months following this victory, Hopkins stopped communicating with DiBella. In an interview with boxing reporter Steve Kim, reprinted in an article Kim published in the online boxing magazine MaxBoxing.com on December 20, 2001 (Kim article), Hopkins stated

Understand, every time I fought (the past couple of years), Lou DiBella got paid, even when he was with HBO, which is f**king wrong. What I'm saying is that the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO? . . . So if they want the cat out [of] the bag, then let's let the f**king cat out of the bag.

Ask HBO why an employee of their company asked me to give him $50,000? And I paid him too. Now, is that ethically right? You think Time Warner [the parent company of HBO] wants to hear about that? What I'm telling you right now is some serious, serious allegations, but these guys here try to make it seem like I'm the bad guy and Lou is probably whispering stuff around too, probably, but he probably isn't saying anything openly. And that influence can hurt me when I get to HBO, [DiBella] being friends with the people over there. . . .

. . . [I]t was me taking out of my career before I even fought Trinidad, that paid to get on a card. Was the money wired, or the checks sent prior, yeah, that was a way of not being discovered. The bottom line is, where did the $50,000 come from? It wasn't a gift. I didn't know him that well to give him $50,000. Way before he started establishing his relationship with me as far as an advisor. So what I'm saying is that every time Lou DiBella did something for Bernard Hopkins or played a role for Bernard Hopkins, even when he was with HBO, he got paid. . . .

. . . I can back up every damn thing I'm saying and it's going to make certain people who are wrong run under the covers and wish I never

> said it. Because other people are going to ask questions and they're going to start digging.

Steve Kim, *As the World of Bernard Hopkins Turns*, MaxBoxing.com, Dec. 20, 2001, at http://www.maxboxing.com/kim/kim122001.asp.

Hopkins repeated these allegations in other media outlets. In an article by Ron Borges published in the *Boston Globe* on December 24, 2001, Hopkins stated

> This is a filthy, filthy game and you gotta be filthy to be in it. That's why I'm going to get out as soon as I can. Nobody is excluded from being led the wrong way by greed. Greed has proven through history to be man's worst enemy. You [DiBella] already received money, whether you should or you shouldn't, so you should keep your mouth shut and go about your business. Don't try and make me feel like an ingrate. They're all against me. When the truth comes out, you'll be shocked.
>
> Nobody in this game does anything for nothing. I'm 36. I got no HBO contract. I can get on a card to make $500,000 if I give him $50,000. Why not? I didn't really see anything wrong with it. It's boxing. . . . I got the evidence right here on my coffee table. The wire transfers. The voided check. I know I ain't crazy. To get on that [HBO] card the fee was $50,000.

Ron Borges, *Hopkins Hops Around*, *Boston Globe*, Dec. 24, 2001, at D9 (alterations in original).

In another article by Bernard Fernandez published in the *Philadelphia Daily News* on January 10, 2002, Hopkins said of DiBella "When the guy says, 'I got HBO dates, you give me this [$50,000] and I'll get you one,' what am I

supposed to do? . . . Let the closet doors open and the skeletons will come out." Bernard Fernandez, *Hopkins Faces Lawsuit, Philadelphia Daily News,* Jan. 10, 2002, at 90. And, in an interview with Rich Marotta broadcast on ESPN Radio on February 1, 2002, Hopkins said

> I paid [DiBella] $50,000 to get on the Roy Jones undercard in Indianapolis to fight Syd Vanderpool or I wouldn't have been on the card. . . . So my thing was is that, hey did you or did you not give $50,000 to an employee from HBO to be an undercard? Yes, I do. Do you have anything? Yes, I have. Here is right here. Now, whatever you wanna take from, well, you know that's criminal, right? . . .
>
> But you have to understand if you['re] under . . . a regulation of TV, [then] you're not supposed to take a dollar from me to get on a card. It's called selling dates.

In December 2001, after learning of Hopkins' statements, DiBella brought a suit against him in the Southern District of New York, charging Hopkins with libeling DiBella in the interview with Steve Kim and in Hopkins' subsequent interviews with the press. The original complaint also alleged breach of contract and, alternatively, damages in *quantum meruit.* The breach of contract claim was dropped, and the jury rejected the *quantum meruit* claim. Thus, that claim is not part of this appeal.

### C. *Proceedings in the Trial Court*

A jury trial was held from November 4 to November 19, 2002. The jury returned a verdict in DiBella's favor on the libel claim arising from Hopkins' interview with Steve Kim, but rejected his three other claims connected with

the articles by Ron Borges and Bernard Fernandez and the radio interview with Rich Marotta. The jury awarded plaintiff $110,000 in compensatory damages and $500,000 in punitive damages. On appeal DiBella challenges the trial court's jury instructions with respect to his burden of proof to show libel. The district court instructed the jury that "you [must] find by clear and convincing evidence that [Hopkins'] statement was false." Plaintiff contends his burden of proof should have been preponderance of the evidence. DiBella claims that had the trial court charged preponderance of the evidence as the burden of proof, he would have succeeded on all of his claims against Hopkins, rather than just on his claim based on the Kim article.

On his cross-appeal, Hopkins challenges the denial of a motion he made for judgment as a matter of law to set aside the jury's verdict and order a new trial. Included in that motion was a request to set aside the verdict favorable to plaintiff as inconsistent with the three other verdicts. Hopkins also challenges the constitutionality of the libel judgment against him, the sufficiency of the evidence used to prove libel, three evidentiary rulings made during the trial, and the damages awarded to plaintiff.

## DISCUSSION

### I Issues on Appeal

On his appeal, plaintiff asserts the district court erred in instructing the jury that he had to prove by clear and convincing evidence that Hopkins' statements were false. DiBella seeks to have the judgment reversed and the case remanded for a new trial on those libel claims that the jury rejected, with the jury instructed that it need only

find falsity of Hopkins' statements by a preponderance of the evidence. DiBella also moves to strike Hopkins' request to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 28(j).

On his cross-appeal Hopkins contends that the district court committed reversible error on seven grounds. He argues (1) the libel judgment violates his freedom of speech under the First Amendment; (2) DiBella failed to satisfy his burden of proving falsity and malice; and (3) the jury's verdict in DiBella's favor on the libel claim related to the Steve Kim article is inconsistent with the jury's rejection of DiBella's three other libel claims. Hopkins further asserts the district court erred (4) in allowing DiBella to impeach attorney Joseph with an order to show cause from the *America Presents* litigation; (5) in admitting attorney Scott Magargee's unredacted time records after the close of evidence; and (6) in excluding the testimony of Hopkins' proposed expert witness. Finally, Hopkins asserts that (7) the evidence was insufficient to warrant the imposition of punitive damages.

In reviewing this record we construe all evidence, draw all inferences, and make all credibility determinations in favor of the party that prevailed before the jury. *See, e.g., Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 195 (2d Cir. 2004). That is, we construe the record substantially in favor of plaintiff because the jury found in DiBella's favor on his major claim at trial. With respect to any facts particular to the three claims on which plaintiff lost, we of course construe the record in favor of defendant Hopkins.

II The Standard of Proof for Falsity in a Libel Claim

The libel claims in this diversity case arise under New York law and, thus, we must apply that law to all the substantive matters before us. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). To prove libel in New York, a plaintiff must establish five elements: "(1) a written defamatory statement of fact regarding the plaintiff; (2) published to a third party by the defendant; (3) defendant's fault, varying in degree depending on whether plaintiff is a private or public party; (4) falsity of the defamatory statement; and (5) injury to plaintiff." *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001). Because defendant disparaged plaintiff in his professional promotions and television packaging business, any libel is libel *per se* and injury to plaintiff is assumed. *Id.*

DiBella's achievements in the boxing industry are plain from the record, and the success with which he sought and obtained the public's attention by organizing and promoting boxing bouts seen by millions of HBO subscribers makes his characterization as a public figure appropriate. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The parties do not dispute this conclusion.

For public figures the third prong of the test for libel requires a showing of "'actual malice' – that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion) (applying the *New York Times* actual malice standard to public figures that are not public officials). A plaintiff must prove actual malice by clear and convincing evidence. *Gertz*, 418 U.S. at 342. Whether the federal

Constitution requires plaintiffs to prove *falsity* by clear and convincing evidence is an open question. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989) ("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. We express no view on this issue.").

### A. *Standard of Review*

We avoid reaching federal constitutional questions where a case may be decided on state law grounds. *Bell v. Maryland*, 378 U.S. 226, 237 (1964); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir. 2001). This prudential doctrine has added weight here because under our diversity jurisdiction, we are obligated to apply New York's standard of proof for falsity, so long as we can safely determine the federal Constitution does not require a higher standard of proof.

States, of course, are free to offer greater protection to individual rights than federal law affords. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000). When a state offers full protection to a federal right, state law necessarily disposes of the constitutional question because discussion of the federal requirement would be academic. If, however, the state standard is not fully protective of a given right, a court must reach the federal constitutional question because federal law could provide greater protection and thereby supercede state law. In this case, then, we must examine state law to determine whether it provides for the highest standard available – clear and

convincing proof of falsity – thus rendering a discussion of the federal constitutional standard unnecessary.

Here, we are persuaded that state law requires clear and convincing proof of falsity, and decline therefore to address this open question in federal constitutional law. Having said that, we recognize at the outset that the New York Court of Appeals has not addressed New York's standard of proof for falsity in a defamation case. In the absence of authoritative law from the state's highest court, we must either (1) predict how the New York Court of Appeals would resolve the state law question, or, if state law is so uncertain that we can make no reasonable prediction, (2) certify the question to the New York Court of Appeals for a definitive resolution. *See Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 220-21 (2d Cir. 2003).

We have considered and rejected the necessity of certifying this question of state law to the New York Court of Appeals. "[I]ssues of state law are not to be routinely certified to the highest court[] of New York . . . simply because a certification procedure is available. The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great. . . . Because it is our job to predict how the forum state's highest court would decide the issues before us, we will not certify questions of law where sufficient precedents exist for us to make this determination." *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 370 (2d Cir. 1999). Certification is to be used in those cases "where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of New York common law for which no New York authority can be found."

*McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997) *(quoting Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51 (2d Cir. 1992)).

We do not believe this case presents any of the exceptional circumstances that would justify using the certification procedure. Rather, in light of existing authority from New York and elsewhere on this matter, we must undertake the imprecise but necessary task of predicting on a reasonable basis how the New York Court of Appeals would rule if squarely confronted with this issue. *See Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116 (2d Cir. 2000). Our prediction is based on several sources.

Principally, we consider the language of the state intermediate appellate courts to be helpful indicators of how the state's highest court would rule. *See id.* at 116. Although we are not strictly bound by state intermediate appellate courts, rulings from such courts are a basis for "ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 321 (2d Cir. 1999). We also look to the language of other jurisdictions on the same issue and other sources the state's highest court might rely upon in deciding the question, including scholarly writings. *Michalski*, 225 F.3d at 116.

### B. *New York Appellate Division Cases*

The New York Appellate Divisions – with the exception of the Fourth Department, which does not appear to have written on the issue – have uniformly stated that a

public figure in New York must prove falsity by clear and convincing evidence. *See New Jersey Steel Corp. v. Lutin*, 297 AD2d 557, 557-58 (1st Dep't 2002); *Armstrong v. Simon & Schuster, Inc.*, 280 AD2d 430, 431 (1st Dep't 2001); *Khan v. New York Times Co.*, 269 AD2d 74, 76-77 (1st Dep't 2000); *Kaplansky v. Rockaway Press, Inc.*, 203 AD2d 425, 426 (2d Dep't 1994); *Patane v. Griffin*, 164 AD2d 192, 195 (3d Dep't 1990).

These cases are not entirely persuasive. First, each simply states that New York requires clear and convincing proof of falsity without citing any relevant authority. In *New Jersey Steel*, *Armstrong*, *Khan*, and *Patane*, the courts cite *New York Times*, 376 U.S. 254, and its progeny for the proposition that actual malice must be proved by clear and convincing evidence, but provide no citation for the independent assertion that falsity should also be held to that standard. *See New Jersey Steel*, 297 AD2d at 557-58; *Armstrong*, 280 AD2d at 431; *Khan*, 269 AD2d at 76-77; *Patane*, 164 AD2d at 195. *Kaplansky* cites authority for the proposition that the "plaintiff had to plead and prove by clear and convincing evidence that the words at issue were substantially false." 203 AD2d at 426. The supporting cases simply state that the plaintiff has the *burden* of proving falsity, however, and are silent on the *standard* of proof. *See id.* (*citing, inter alia, Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); *Immuno AG. v. Moor-Jankowski*, 77 NY2d 235, 245 (1991); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379-80 (1977)). Hence, although these cases are quite clear on what the law in New York *is*, they do not give any indication of how that law came to be.

Second, we note that four of the Appellate Division cases did not turn on the falsity of the statements, and

thus their assertions that New York requires clear and convincing proof of falsity are dicta. *See New Jersey Steel*, 297 AD2d at 558 (reducing a damages award based on plaintiff's failure to demonstrate actual damages); *Armstrong*, 280 AD2d at 431 (upholding trial court's grant of summary judgment based on lack of proof of actual malice); *Khan*, 269 AD2d at 75 (noting that defendant concedes falsity and only challenges the finding of actual malice); *Patane*, 164 AD2d at 195, 198 (noting that plaintiff abandoned his challenge to summary judgment in defendant's favor). The discussion of the standard of proof for falsity was not dicta in *Kaplansky*, however, because the plaintiff in that case appealed the trial court's finding that he failed to carry his burden of proving libel (including falsity and actual malice). *See Kaplansky*, 203 AD2d at 426.

Nonetheless, Appellate Division cases are helpful indicators of state law, *Michalski*, 225 F.3d at 116, and we may look to the Appellate Division's statements concerning the standard of proof for falsity in New York, whether dicta or not, as persuasive evidence of the views of New York's intermediate appellate courts on the matter. Moreover, it would be inappropriate for a federal court to disregard these cases based solely on the lack of authoritative support for the assertions they contain. Whether or not the Appellate Divisions have articulated a reasoned basis for concluding that New York requires clear and convincing proof of falsity, there can be no doubt that those courts believe that to be the appropriate standard. Even though these cases do not totally persuade us that New York requires clear and convincing proof of falsity, it is plain that New York's intermediate appellate courts believe that is the appropriate standard of proof, and we

consider this a helpful indicator of how the New York Court of Appeals would rule on this issue.

### C. *The Law of Other Jurisdictions*

We also consider the law of other jurisdictions to be a useful guide in predicting how the New York Court of Appeals would rule. We note that several federal courts relying on New York law, including this Court, have stated – albeit in dicta and without authoritative citation – that New York requires clear and convincing proof of falsity, and that most jurisdictions outside New York that have considered the issue have also adopted this standard of proof.

Our own case law is somewhat unclear on this point. In *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), we stated that New York requires a public figure to prove with "convincing clarity *not only that the appellant's statements were false*, but that appellant knew they were false or made them with reckless disregard of their truth or falsity." *Id.* at 889-90 (emphasis added). This case conflicts with our view of New York law stated seven years earlier in *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), where we noted that *New York Times v. Sullivan* "changed state libel law only to the extent of requiring public officials to prove actual malice with convincing clarity. Other elements of proof . . . *need only be proved by a preponderance of the evidence – the burden of proof imposed by New York law.*" *Goldwater*, 414 F.2d at 341 (emphasis added). We have not been able to identify a New York case decided between 1969 and 1976 reflecting a change in New York law. Nonetheless, several district courts applying New York law in diversity cases have followed our more recent

view of New York's standard of proof as enunciated in *Buckley*. *See, e.g., Coliniatis v. Dimas*, 965 F. Supp. 511, 517 (S.D.N.Y. 1997) (stating that "[w]here a plaintiff is a public official, he must prove 'by clear and convincing evidence' that the published material is false and that defendant published the material 'with actual malice'"); *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1262 (S.D.N.Y. 1989) (applying clear and convincing standard to public figures); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 558 (S.D.N.Y. 1984) (same).

We also observe that many jurisdictions outside New York that have considered this issue have found clear and convincing proof of falsity is required for public figures and sometimes even for private figures. *See, e.g., Deutcsh v. Birmingham Post Co.*, 603 So.2d 910, 912 (Ala. 1992) (holding that public figure plaintiff must prove falsity by clear and convincing evidence to succeed on a libel claim); *Barnett v. Denver Publ'g Co., Inc.*, 36 P.3d 145, 147 (Colo. Ct. App. 2001) (same); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 905-06 (Iowa 1996) (noting that plaintiff must prove falsity and malice by clear and convincing evidence); *Hoch v. Prokop*, 507 N.W.2d 626, 629 (Neb. 1993) (stating that public figures must prove falsity by clear and convincing evidence to succeed on a libel claim); *Newman v. Delahunty*, 681 A.2d 671, 674 (N.J. Super. Ct. 1994) (same); *Pritt v. Republican Nat'l Comm.*, 557 S.E.2d 853, 862 (W. Va. 2001) (same); *cf. Batson v. Shiflett*, 602 A.2d 1191, 1210 (Md. 1992) (stating that public figures must prove falsity by clear and convincing evidence to establish defamation consistent with First Amendment). In fact, courts have found good reason to favor the higher standard of proof. In *Robertson v. McCloskey*, 666 F. Supp. 241 (D.D.C. 1987), for example, the district court held:

> [A] clear and convincing standard of proof for falsity would resolve doubts in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew the statement was false or acted in reckless disregard of its truth. Finally, [the standard] has more than merely a logical or symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error.

*Id.* at 248; *see Nev. Indep. Broad. Corp. v. Allen*, 664 P.2d 337, 343 n.5 (Nev. 1983) (noting that "[p]ractically speaking, it may be impossible to apply a higher standard to 'actual malice' than to the issue of falsity").

We acknowledge that a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence. *See, e.g., Moldea v. New York Times Co.*, 15 F.3d 1137, 1142 (D.C. Cir. 1994) (finding that plaintiffs need only prove falsity by a preponderance of the evidence under District of Columbia law); *Nat'l Ass'n of Gov't Employees/Int'l Bhd. of Police Officers v. Buci Television, Inc.*, 118 F. Supp. 2d 126, 130 (D. Mass. 2000) (same under Massachusetts law); *Bentley v. Bunton*, 94 S.W.3d 561, 586-87 (Tex. 2002) (same under Texas law). We are also aware that the Ninth Circuit has concluded that our Circuit requires plaintiffs to prove falsity only by a preponderance of the evidence. *See Rattray v. City of Nat'l City*, 51 F.3d 793, 801 (9th Cir. 1994) (stating that the

Ninth Circuit "adopt[s] the holding of the Second Circuit" that falsity "need only be proven by a preponderance of the evidence"). The Ninth Circuit, however, relied on our decision in *Goldwater,* which, as we explained above, does not represent our most recent understanding of New York law on this issue.

To be sure, the state and federal cases expressing the majority view (i.e., clear and convincing proof of falsity) and the minority view (i.e., preponderance of the evidence to prove falsity), like the New York Appellate Division cases on the subject, sometimes state the rule in dicta and without authoritative citation. Our role here, however, is merely to attempt to identify what other courts think about this issue, because this thinking would undoubtedly be taken into account by the New York Court of Appeals if and when it squarely confronts the issue. As with the Appellate Division cases, then, we believe the case law of other jurisdictions provides persuasive evidence of what the New York Court of Appeals' peers think about this matter, and thus establishes a useful marker for predicting how it would rule.

### D. *Other Sources*

We further note that the Committee on Pattern Jury Instructions of the Association of Justices of the Supreme Court of the State of New York has relied on New York Appellate Division cases in incorporating the clear and convincing evidence standard of proof for falsity in the New York Pattern Jury Instructions. *See* N.Y. Pattern Jury Instr. § 3:23 (stating that a plaintiff alleging libel "must prove by clear and convincing evidence that the statement was false, meaning substantially untrue"); *id.* commentary

(relying, *inter alia*, on *Khan*, 269 AD2d 74, and *Kaplansky*, 203 AD2d 425). The district court charged the jury in this case with that instruction. Moreover, the leading treatise on defamation states that clear and convincing evidence is the prevailing standard of proof for falsity. 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 3.4, at 3-13 & n.46 (3d ed. 2003) (explaining that public figures "may have the burden not only of pleading and proving falsity, but also of establishing it 'with convincing clarity,'" reaffirming that "[m]ost courts that have addressed the issue . . . have required the higher standard of proof," and citing cases for that proposition).

In sum, we think there is significant and persuasive evidence from which to conclude that the New York Court of Appeals would hold that falsity must be proved by clear and convincing evidence. We base this conclusion on (1) the uniform view of the New York Appellate Divisions, (2) the majority view of other jurisdictions (both state and federal), (3) the fact that the clear and convincing evidence standard has already been incorporated into the New York Pattern Jury Instructions, and (4) scholarly writing in this field. As a consequence, we hold the district court correctly charged the jury requiring it to find falsity by clear and convincing proof.

## III Hopkins' Claims

Hopkins raises seven claims on his cross-appeal. We briefly discuss each.

### A. *Constitutionality of the Libel Judgment*

Hopkins argues that the nature of his $50,000 payment to DiBella is a matter of interpretation, and thus the

libel judgment entered against him punishes him for expressing his opinion that the $50,000 was a bribe. This, he contends, violates his right to freedom of speech under the First Amendment. Hopkins' belief about the $50,000 is a question of fact, and in finding that Hopkins libeled DiBella, the jury necessarily concluded that Hopkins knew or should have known that his statements about DiBella were false. It is well settled that when a plaintiff meets the evidentiary standards for proving libel, the speech at issue loses its constitutional protection and exposes the defendant to damages. *Cf. New York Times Co.*, 376 U.S. at 279-80. Accordingly, Hopkins' constitutional challenge is misplaced. His challenge is more appropriately directed to the sufficiency of the evidence by which the jury concluded that his statements were an intentional misstatement of fact rather than simply his opinion. Thus, we move to the sufficiency argument.

B. *Sufficiency of the Evidence to Prove Falsity and Malice*

Hopkins asserts that DiBella did not prove by clear and convincing evidence that Hopkins' statements were false and that DiBella failed to prove that Hopkins acted with actual malice. Because of these alleged failures of proof, Hopkins maintains that the district court erred in not granting his post-trial motion for judgment as a matter of law.

When considering a post-verdict motion for judgment as a matter of law, the trial court should view all the evidence in the record as a whole and "draw all reasonable inferences in favor of the nonmoving party, [but] it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530

U.S. 133, 150 (2000). A district court may set aside a verdict only where "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [jurors] could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 168 (2d Cir. 1980).

Notwithstanding the above principles, Hopkins invites us to engage in a more searching appraisal of the factual record because there is an added layer of review with respect to the actual malice element of libel: Appellate judges "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984). This does not mean that an appellate court may sit as an independent trier of fact, nor is the independent review function equivalent to a *de novo* review of the ultimate judgment itself. In other words, a reviewing court may not make its own appraisal of all the evidence to decide whether judgment should be entered for plaintiff. *Id.* at 514 n.31.

Instead, the task of a reviewing court is to examine only those statements related to the issue of malice and the circumstances under which they were made to establish whether the actual malice standard is met. *See id.*; *see also Harte-Hanks*, 491 U.S. at 688 (noting that the reviewing court must ensure that the principles of the First Amendment are protected). Hence, we engage in only limited *de novo* review of the record to determine whether there is sufficient evidence to find clearly and convincingly that Hopkins made his statements with actual malice,

according traditional deference to the jury's underlying credibility determinations.

From our *de novo* review of the record with respect to the actual malice element of libel we conclude that Hopkins said that he told Steve Kim that he (Hopkins) paid DiBella to get on the Jones-Hall undercard, that the transaction was surreptitious, and that "every time Lou DiBella did something for Bernard Hopkins or played a role for Bernard Hopkins, even when he was with HBO, he got paid." DiBella's testimony and the testimony of HBO executives, however, painted a completely different picture: the payment was not surreptitious, was not made while DiBella was still employed by HBO, did not have anything to do with Hopkins getting on the undercard, and Hopkins was aware of the true facts when he made his statements to Kim. Thus, the jury heard significantly different accounts of what transpired between Hopkins and DiBella, and it was entitled to believe some witnesses and discredit others. The jury by its verdict found that DiBella and his witnesses were credible and that Hopkins was not.

Hopkins was present when Joseph offered to pay DiBella $50,000 on May 19, 2000, and Hopkins also knew that DiBella was actually paid in January 2001. Hopkins thus knew the payment was not made while DiBella was still employed at HBO. Hopkins knew or should have known that the payment was for future services that DiBella intended to perform for Hopkins once DiBella left HBO, not as a *quid pro quo* for getting on the Jones-Hall undercard.

Accordingly, there is evidence that, when viewed in the light most favorable to DiBella, clearly and convincingly shows that the statements Hopkins made about the nature of his $50,000 payment to DiBella were false and that Hopkins knew or should have known they were false when he made them, or that he spoke with reckless disregard of the statements' truth or falsity. Thus, Hopkins acted with actual malice. Therefore, his motion for judgment as a matter of law was properly denied.

### C. *Inconsistency of the Jury's Verdicts*

Hopkins insists that the district court erred in denying his post-verdict motion to set aside the jury's verdicts – three in his favor and one against him – as inconsistent. Essentially, he maintains it was unreasonable and inconsistent for the jury to find he did not libel DiBella in the Borges and Fernandez articles, or in the Marotta radio interview, but that he did libel DiBella by his similar comments in the Kim article.

We need not reach or decide this issue because Hopkins waived it by failing to raise an objection to the inconsistent verdicts while the jury was still empaneled. Instead he raised this objection for the first time in his post-trial motions. It is well settled that if a party does not challenge the consistency of jury verdicts while the jury is still empaneled, the objection is waived. *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 54-56 (2d Cir. 1992); *United States Football League v. National Football League*, 842 F.2d 1335, 1367 (2d Cir. 1988).

### D. *The Order to Show Cause*

Hopkins maintains it was error to allow DiBella to impeach Joseph's testimony with an order to show cause from the *America Presents* litigation requesting evidence on whether Joseph was truthful before that court. Hopkins seeks to supplement the record on appeal with Judge Kane's recent opinion in *America Presents, Ltd. v. Hopkins*, 330 F. Supp. 2d 1217 (D. Colo. 2004), in which Judge Kane concludes that Joseph, in fact, perpetrated "no fraud" on the Colorado district court. *Id.* at 1233. DiBella moved to strike Hopkins' request. In granting the motion to strike, we conclude that the district court correctly ruled that the order to show cause was admissible for impeachment purposes.

Joseph took the stand in the trial below to testify regarding the circumstances surrounding Hopkins' $50,000 payment to DiBella, and thus put his credibility at issue. *See* Fed. R. Evid. 613(b). The transcript of Joseph's comments in the *America Presents* litigation, on which the order to show cause was based, indicates that in the district court in Colorado, Joseph denied that any kind of relationship between DiBella and Hopkins existed. DiBella's attorney, Judd Burstein, Esq., sought to impeach Joseph on cross-examination with the order to show cause entered by Judge Kane in the then-pending *America Presents* litigation in Colorado. This order was entered following an allegation by America Presents that attorney Joseph lied to the court in August 2000 by saying that there was "no relationship" between DiBella and Hopkins when, in fact, DiBella had been advising and representing Hopkins for three months. Joseph knew of this relationship because he offered DiBella a check for $50,000 in May 2000 to pay DiBella for his services. Judge Kane thought

he may have been misled and ordered the parties to show cause why he should not reopen the record and grant a mistrial. That order to show cause was admitted in the instant litigation to challenge Joseph's underlying statements for impeachment purposes.

After Joseph explained on cross-examination what he meant by the statement that DiBella and Hopkins had no relationship, the jury below could independently determine whether this statement was consistent with Joseph's testimony that he was involved in preparing a $50,000 payment from Hopkins to DiBella three months prior to making the statement.

The order to show cause gave Joseph a powerful incentive to portray the $50,000 as a bribe rather than a legitimate payment for services, because if Joseph testified in the instant trial that the payment was above board, he would essentially admit that he had lied to the district court in Colorado. Judge Chin instructed the jury on the meaning of the order to show cause, carefully explaining that it was not a finding by the Colorado district court that Joseph had lied. That instruction gave the jury all of the information necessary to properly weigh the order's impeachment value. Hence, it was properly admitted in evidence.

Hopkins further moved under Federal Rule of Appellate Procedure 28(j) to supplement the record with Judge Kane's recent decision in *America Presents*, in which Judge Kane found that Joseph perpetrated "no fraud" on the court. Hopkins contends that this irrefutably proves the district court allowed inaccurate and prejudicial evidence to be admitted at trial, and thus reversal is justified. As a threshold matter, Hopkins cannot introduce Judge Kane's

factual conclusions into the record before this Court. Under Rule 28(j), only "pertinent and significant *authorities* [that] come to a party's attention after the party's brief has been filed[,] or after oral argument but before decision" may be added to the record on appeal. Fed. R. App. P. 28(j) (emphasis added). The Rule *cannot* be used to submit new *evidence* to the appeals court. *Bowman v. City of Franklin*, 980 F.2d 1104, 1107 n.1 (7th Cir. 1992); *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992).

Judge Kane's factual conclusions regarding whether or not Joseph lied to him constitute additional evidence that affect the weight of the order to show cause used to impeach Joseph's testimony. The possibility that new facts – had they been known two years ago when the jury heard Joseph's testimony – might have affected the jury's assessment of his credibility, is immaterial. Rule 28(j) simply does not allow this type of evidence to be introduced for the first time on appeal and therefore we grant DiBella's motion to strike it.

### E. *Admission of the Unredacted Time Sheet*

Hopkins contends that the district court committed reversible error in reopening the factual record during DiBella's summation to allow the unredacted time record of another of Hopkins' lawyers, Scott Magargee, Esq., to be published to the jury. We see no error in the district court's decision to reopen the record and admit the time sheet.

At trial, attorney Magargee testified that he was present at an April 11, 2000 meeting with Joseph and Hopkins, during which DiBella called and spoke to the group via speakerphone. Magargee testified that DiBella

said "that he could get or could convince HBO to get Bernard [Hopkins] on that undercard. . . . And he also said that his fee in connection with that, or for his services, would be $50,000." Hopkins' present lawyer, Robert Hayes, Esq., with whom attorney Magargee is associated, submitted Magargee's time sheets as added proof that the meeting took place. Hayes submitted the redacted time sheets ostensibly to protect privileged material. Magargee testified that from the client billing numbers and other matters noted on his time sheet, he was sure that the date on which DiBella called was April 11, 2000.

The time sheet contained no mention of any contact between Hopkins and Magargee on that day. When DiBella's attorney attempted to cross-examine Magargee on this point, Hayes objected, stating "It's been redacted." This precipitated a sidebar and instruction to the jury to disregard Hayes' objection. Judge Chin also asked to inspect the unredacted time sheet *in camera* to determine what had been redacted. The document was not reviewed until plaintiff's counsel's summation, during which Judge Chin realized that "Calls with B. Hopkins" had been redacted. Judge Chin interrupted attorney Burstein's summation and immediately called another sidebar. Noting that the entry "Calls with B. Hopkins" strongly suggested that attorney Magargee had called Hopkins that day but had not met with him, Judge Chin rebuked defense counsel Hayes for withholding the information and, at attorney Burstein's request, reopened the record and allowed the evidence to be published to the jury. In an opinion denying defendant's post-verdict motion for judgment as a matter of law Judge Chin fully explained that there was no privileged communication, and it was instead selective redaction. *DiBella v. Hopkins*, 285 F. Supp. 2d

394, 409 (S.D.N.Y. 2003). Judge Chin declined to sanction Hayes but referred the matter to the district court's Committee on Grievances. *Id.* at 410. Hayes appealed that decision. Another panel of this Court determined that we lacked jurisdiction over the matter and dismissed Hayes' appeal on May 4, 2004.

"A motion to reopen the record for the presentation of new evidence is addressed to the sound discretion of the [trial] court," and it may only be reversed on appeal if the trial court abused its discretion. *See Ammar v. United States*, 342 F.3d 133, 141 (2d Cir. 2003). Hopkins asserts that there are two grounds on which the district court abused its discretion: (1) the entry "Calls with B. Hopkins" was not within the scope of Judge Chin's discovery order, and thus Hopkins had no obligation to produce it; and (2) the entry "Calls with B. Hopkins" was privileged, and thus Judge Chin could not order it to be shown to the jury. Neither argument is persuasive.

1. Scope of the Discovery Order

At his pre-trial deposition, after Magargee stated that he represented Hopkins in other areas unrelated to the present litigation or the *America Presents* litigation, the parties telephoned Judge Chin for two rulings before the deposition proceeded: (1) What matters, extraneous to the present litigation, could DiBella's counsel inquire about consistent with attorney-client privilege?; and (2) What time records could DiBella demand that Hopkins' counsel produce to prove whether Magargee was actually at the April 11, 2000 meeting? Judge Chin speaking extemporaneously via telephone, ruled that "in a general sense [Magargee] should testify to what the firm does for Mr.

Hopkins." Judge Chin further stated that if there is a record that corroborates whether there was a meeting at which the witness was present, that is relevant. When attorney Burstein clarified DiBella's request for "any record relating to this supposed April telephone conversation," Judge Chin replied, "That's fine. It's just the time record for the one meeting if one exists."

The entry "Calls with B. Hopkins" on Magargee's April 11, 2000 time sheet clearly falls within this order. The district court's ruling contemplated information relevant to whether the witness was at the meeting and whether such a meeting took place. While it is technically true that the entry "Calls with B. Hopkins" is not a time record for the actual meeting, the entry is clearly probative. The proper scope of the trial court's discovery order thus encompasses the entry. This should have been obvious to Hopkins' counsel since the court said it was "fine" in response to Burstein's request for "any record relating to this supposed April telephone conversation." Hence, the district court did not abuse its discretion by demanding the production of the time sheet entry after the close of evidence.

2. Attorney-Client Privilege

Hopkins avers that the time entry was protected by attorney-client privilege and thus properly redacted. Specifically, he declares that the district court improperly relied on the federal common law of privilege in finding that the entry was not privileged; Hopkins claims that state privilege law, which is controlling in this case, compels a different result.

We agree with Hopkins that New York law applies. Federal Rule of Evidence 501 states, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, . . . shall be determined in accordance with State law." Under New York law, however, the time record at issue is not privileged. In New York, attorney time records and billing statements are not privileged when they do not contain detailed accounts of the legal services rendered. *See Eisic Trading Corp. v. Somerset Marine, Inc.*, 212 AD2d 451, 451-52 (1st Dep't 1995). Time records and billing statements that are "detailed in showing services, conversations, and conferences between counsel and others" to such an extent that "to allow access to [the] material would disclose . . . trial strategy, and reveal the . . . legal work that has been done by [the party's attorneys]" are privileged in New York. *Licensing Corp. of Am. v. Nat'l Hockey League Players Ass'n*, 153 Misc.2d 126, 128 (N.Y. Sup. Ct. 1992).

The entry "Calls with B. Hopkins" is not privileged under this rule. It is not detailed in any respect, and it conveys no information about discovery, trial strategy, factual investigation, or any other legal services rendered. To the extent that Hopkins claims it reveals conversations and conferences between attorney and client, we note that Magargee, with Hopkins' consent, testified that he had conversed and conferenced with Hopkins that day, so Hopkins can hardly be heard to assert privilege on that ground. Indeed, Hopkins' privilege claim seems to be based on protecting information regarding the medium by which Hopkins and Magargee conversed. This information is not privileged, and, as Judge Chin concluded, the assertion of privilege on such a ground in this case (where a telephone

conversation between Magargee and Hopkins casts doubt on Magargee's testimony that he met with Hopkins in person) smacks of an intent to mislead. *DiBella*, 285 F. Supp. 2d at 409.

Thus, the trial court's decision to reopen the record and allow the unredacted time sheet to be published to the jury was well within its discretion.

### F. *Exclusion of Hopkins' Expert*

Hopkins avers that refusing to allow W. Michael Hoffman, Hopkins' expert on business ethics, to testify was error. Hopkins sought to have Hoffman testify that it was unethical for DiBella to solicit a $50,000 payment from Hopkins while still employed by HBO. Federal Rule of Evidence 702 allows expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony must be helpful to the jury in comprehending and deciding issues beyond the understanding of a layperson. Whether to admit expert testimony is a matter left to the discretion of the trial judge and is set aside only when the decision is "manifestly erroneous." *United States v. Schwartz*, 924 F.2d 410, 425 (2d Cir. 1991). Hopkins argues that the district court rejected Hoffman's testimony because it did not believe Hoffman, and that this constitutes manifest error. To the contrary, the district court had ample grounds for refusing to allow Hoffman to testify.

The district court concluded that the report from which the expert proposed to testify made "conclusions, observations, and speculations [that] are not proper testimony from an expert witness." *DiBella v. Hopkins*,

No. 01 Civ. 11779, 2002 WL 31427362, at *4 (S.D.N.Y. Oct. 30, 2002). For example, Hoffman characterized Joseph as "a credible witness," despite the rule that expert witnesses may not testify based on their personal view of the veracity of a lay witness's testimony. *See United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988), *rev'd in part on other grounds*, 856 F.2d 5 (2d Cir. 1988). Hoffman also inappropriately drew a legal conclusion by opining that DiBella's actions amounted to extortion. *See id.* at 139 ("[Expert witness] statements embodying legal conclusions exceed[] the permissible scope of opinion testimony under the Federal Rules of Evidence.").

In addition, the district court correctly concluded that Hoffman's testimony would unnecessarily confuse the jury because the real issue in the case was not whether DiBella acted ethically, but rather what actually transpired between DiBella and Hopkins – i.e., whether the $50,000 was or was not a bribe, and whether Hopkins did or did not believe it was a bribe. *DiBella*, 2002 WL 31427362, at *4. Thus, it was not an abuse of the district court's discretion to exclude Hoffman's testimony.

G. *Sufficiency of the Evidence to Support Punitive Damages*

Finally, Hopkins argues that there was insufficient evidence to support an award of $500,000 in punitive damages, and that such an award for the publication of a single defamatory article is unconstitutionally excessive.

Hopkins confuses two distinct inquiries in his appeal: first, whether the evidence supported an award of punitive damages at all and, second, whether the amount is unconstitutionally excessive. Insofar as Hopkins challenges the

amount as excessive, his claim is procedurally barred. Hopkins failed to challenge the amount of the punitive damages in his post-trial motion for judgment as a matter of law; the district court expressly found that Hopkins only argued that there was no basis for an award of punitive damages. *DiBella*, 285 F. Supp. 2d at 403. As we stated in *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella*, 350 F.3d 73 (2d Cir. 2003), excessive punitive damages that allegedly violate the Due Process Clause may be challenged through post-trial motions after the verdict is entered. *Id.* at 89. It is critical in preserving the issue for appellate review that the district court have an opportunity to rule first on the excessiveness issue. *Id.* By not raising his excessiveness objection before the district court, Hopkins failed to preserve this issue for our review.

Hopkins' preserved objection to the award of punitive damages – that there was insufficient evidence to support an award of punitive damages – is without merit. Under New York law, punitive damages in a defamation case are justified "to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Prozeralik v. Capital Cities Communications, Inc.*, 82 NY2d 466, 479-80 (1993). This is not automatically satisfied by the requisite finding of "actual malice" for libel; rather, it requires "hatred, ill will, spite, criminal mental state or that traditionally required variety of common-law malice." *Id.* at 480. New York Pattern Jury Instruction § 3:30, under which Judge Chin charged the jury, is in accord with this standard.

There is ample evidence from which the jury could have concluded that Hopkins acted with hatred, ill will, and spite, and deliberately attempted to injure DiBella. The jury heard a recording of Hopkins' entire conversation

with Steve Kim, and was in a position to evaluate Hopkins' statements in context. Kim testified that he understood Hopkins to be specifically asking him to write and publish an article containing the false accusations against DiBella. Hopkins also told Kim that he wanted Kim to print his comments (which, again, the jury found Hopkins knew were false) because, as a reporter, "you can't be held accountable for nothing because you're protected by the Constitution of America." Although the jury did not find that the subsequent dissemination of these allegations in the *Philadelphia Daily News*, *Boston Globe*, and on ESPN Radio amounted to libel, it is uncontroverted that Hopkins repeated his allegations about DiBella to just about anyone who would listen. Based on this evidence, the jury could readily have found that Hopkins acted with ill will and maliciousness in spreading false allegations about DiBella. This is sufficient to sustain an award for punitive damages.

## CONCLUSION

We have considered the appellant's and cross-appellant's remaining arguments and find them all to be without merit. Accordingly, the judgment is affirmed, and DiBella's motion to strike is granted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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|---|---|---|
| LOU DIBELLA and DIBELLA ENTERTAINMENT, INC., | : | |
| Plaintiffs, | : | OPINION |
| – against – | : | 01 Civ. 11779 (DC) |
| BERNARD HOPKINS, | : | |
| Defendant. | : | |

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CHIN, D.J.

In this libel case, a jury rendered a verdict on November 19, 2002, in favor of plaintiff Lou DiBella requiring defendant Bernard Hopkins to pay DiBella $110,000 in compensatory damages and $500,000 in punitive damages. The jury found that DiBella had been libeled by statements Hopkins made to a reporter, Steven Kim, that were published in an article on a boxing website on the

Internet. The jury found that DiBella had not proven libel as to statements made by Hopkins that were published in two other articles and during a radio interview. The jury also rejected a claim by DiBella and his company, DiBella Entertainment, Inc. ("DiBella, Inc."), for quantum meruit.

Before the Court are: (1) Hopkins's motion for judgment as a matter of law or for a new trial, and (2) plaintiffs' motion for sanctions, a new trial, and an amended judgment. For the reasons that follow, Hopkins's motion for judgment as a matter of law or a new trial is denied. Plaintiffs' motion is also denied to the extent he seeks sanctions and a new trial, although the matter of defense counsel's conduct will be referred to the Court's Committee on Grievances. Plaintiffs' motion is granted to the extent I will issue an amended judgment that includes interest.

## BACKGROUND

### A. The Facts

The underlying facts are set forth in my prior decisions. *DiBella v. Hopkins*, 187 F. Supp. 2d 192 (S.D.N.Y. 2002); *DiBella v. Hopkins*, No. 01 Civ. 11779 (DC), 2002 WL 31357812 (S.D.N.Y. Oct. 18, 2002). Construing the evidence presented at trial in the light most favorable to DiBella, the facts may be summarized as follows:

DiBella is an independent advisor, matchmaker, and television packager in boxing. For some years he was employed at the cable network Home Box Office ("HBO"), helping develop HBO's successful boxing program. In 1999, he began considering leaving HBO, and he started negotiating a departure package in early 2000. His intent

was to create his own independent company, and eventually he did so by forming DiBella, Inc. He stopped reporting to HBO's offices in early April 2000, and a termination agreement was executed on May 12, 2000. As part of his agreement, DiBella was to be given "dates" on which he would be able to arrange fights to be aired on HBO. (Tr. 358).[1] These "dates" were extremely valuable, for fighters who fought on HBO programs received tremendous exposure. (*Id.* 361-62).

In January 2000, DiBella learned that Roy Jones would be fighting Richard Hall in a match that would be televised on HBO in May 2000. The fight was not considered a particularly good fight. In mid-January, Kery Davis, an HBO employee who worked under DiBella, proposed that Hopkins fight on the undercard of the Jones-Hall fight, suggesting that this would improve the card as it would help build interest in a potential future fight between Jones and Hopkins. A Jones-Hopkins fight would be an exciting fight. Davis suggested Brian Barbosa as an opponent for Hopkins on the Jones-Hall undercard. The Hopkins-Barbosa fight was approved and a deal was reached in January. (*Id.* 367-72).

In early 2000, after the Barbosa fight had been set and when DiBella believed he would be leaving HBO by the end of February, DiBella began discussing a possible relationship with Hopkins. (*Id.* 372-73). In DiBella's view, Hopkins was "a great fighter [who] had been underexposed

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[1] "Tr." refers to the trial transcript. References to "PX," "DX," and "CX" are to, respectively, plaintiffs' exhibits, defendant's exhibits, and Court exhibits received at trial. "Def.'s Mem." refers to Hopkins's memorandum of law in support of his motion for judgment as a matter of law or for a new trial.

and undermarketed." (*Id.* 363; *see id.* 373-74, 380). DiBella believed he could help. By February 2000, he and Hopkins had "a handshake agreement." (*Id.* 374). DiBella agreed to provide advice and to assist in marketing and publicity. Hopkins agreed to pay DiBella a $50,000 fee for services for the period prior to December 2000, when Hopkins's next fight would occur. (*Id.* 373-74). The $50,000 fee had nothing to do with HBO's decision to put Hopkins on the undercard with Barbosa for the Jones-Hall fight. (*Id.*). The $50,000 was to be paid after the scheduled Barbosa fight, when Hopkins would be receiving his purse. (*Id.* 378).

When DiBella began his discussions with Hopkins and they agreed to work together, DiBella was still an employee of HBO. Senior HBO management, however, was aware of and consented to DiBella's agreement to work with Hopkins. DiBella told at least four high-ranking executives of HBO that he had an agreement with Hopkins, for, as he recognized, "it was clearly a potential conflict of interest." (*Id.* 381-82). No one at HBO objected, and in fact one or more of the HBO executives told DiBella that "it was a good thing," as HBO was happy at the prospect of Hopkins fighting on one of DiBella's dates. (*Id.* 382; *see id.* 156-57 (Davis testifying that Hopkins was exactly the kind of fighter HBO hoped DiBella would deliver)).

In late March or early April, Hopkins asked DiBella for a loan of $30,000 for training expenses. DiBella lent him the money, without a written loan agreement and at no interest, because Hopkins was now his client and DiBella "trusted him." (*Id.* 382-83). DiBella told HBO executives about the loan because he was still "technically" an HBO employee. HBO did not object. (*Id.* 383-84).

In the meantime, Barbosa suffered an injury in March and it became apparent that he would not be able to fight Hopkins as scheduled in May. Barbosa was replaced by a fighter named Syd Vanderpool. (*Id.* 385-88).

DiBella's employment with HBO ended officially on May 12, 2000. The Hopkins-Vanderpool fight occurred the next day, and Hopkins won. DiBella was present, working on behalf of Hopkins. (*Id.* 393-94). DiBella watched the Jones-Hall fight, and afterwards he met briefly with Hopkins and Hopkins's lawyer, Arnold Joseph, in a coffee shop or restaurant. They did not offer him payment of the $50,000 fee or repayment of the $30,000 loan. (*Id.* 394-96).

On May 19, 2000, a few days after the fight, Hopkins and Joseph met with DiBella again. They gave him a $30,000 check, in repayment of the loan. (*Id.* 396-97). They showed him a $50,000 check and said they were prepared to pay him the $50,000 fee at that time, but they said they preferred to defer payment of the $50,000 because of litigation that was pending in Denver (the "*America Presents*" litigation). DiBella was expected to be a witness in that case, and they said they were concerned about the appearance of paying a $50,000 fee to DiBella when he was expecting to be a witness on Hopkins's behalf. DiBella agreed, because Hopkins was an important client. (*Id.* 398-99).

Thereafter, DiBella worked hard for Hopkins. He advised Hopkins on public relations and building his image and developing a relationship with the press. He negotiated for Hopkins on what turned out to be a successful fight with Echols in December. (*Id.* 403-07). Hopkins finally paid the $50,000 fee to DiBella after the Echols fight, in January 2001. (*Id.* 405-06, 780).

After the Echols fight, DiBella continued to work to build Hopkins's image and profile, with a view toward creating opportunities for him. Eventually, he called the boxing promoter Don King and proposed a middleweight tournament that would include Hopkins. At the time, the three major boxing ratings organizations each had a different middleweight champion – Hopkins, William Joppy, and Keith Holmes. In addition, Felix Trinidad, one of the most celebrated boxers in the world, was about to move from the super welterweight class into the middleweight class. The concept was to have a middleweight tournament involving the three champions and Trinidad – culminating in a match that would produce the "undisputed" middleweight champion of the world. (*See id.* 407-13).

DiBella acted as lead negotiator for Hopkins. He also provided Hopkins with advice and pressed Hopkins to agree to a relationship with King when Hopkins was reluctant to do so. Such a relationship was critical – the other three fighters were under contract to King and King would not agree to permit Hopkins to participate without a long-term deal, for King would lose control of the middleweight championship if Hopkins won the tournament without a commitment to remain with King. Eventually, a deal was struck. (*Id.* 414-18). DiBella agreed to allow one of his HBO dates to be used. (*Id.* 420).

The tournament was a huge success from Hopkins's perspective. He beat Holmes in his preliminary match and Trinidad beat Joppy in the other preliminary match. That set the stage for the championship match between Hopkins and Trinidad. On September 29, 2001, in what was generally regarded as a great fight, Hopkins beat Trinidad by a final round technical knockout. Hopkins thus

emerged from the tournament as the "undisputed" champion of the world. The fights were televised and Hopkins received tremendous exposure and attention.

Yet, within weeks after the Trinidad fight, Hopkins stopped returning DiBella's telephone calls. As DiBella testified: "Just all of a sudden everything ended." (*Id.* 430-31).

In December 2001, Steven Kim, a reporter for Maxboxing.com, an Internet boxing magazine, called DiBella and asked for a comment: he said that Hopkins had stated that DiBella "'took a bribe of $50,000 to put him on HBO.'" (*Id.* 433). On December 20, 2001, Kim published an article on the Internet at Maxboxing.com that quoted Hopkins as follows:

> Understand, every time I fought (the past couple of years), Lou DiBella got paid, even when he was with HBO, which is f**king wrong. What I'm saying is that the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO? So the thing is everyone's trying to make Lou this angel and that Bernard Hopkins is a f**kin' dummy because they had nothing to say after I kicked Trinidad's ass and they're trying to make me look like the bad guy. So if they want the cat out the bag, then let's let the f**king cat out of the bag.
>
> Ask HBO why an employee of their company asked me to give him $50,000? And I paid him too. Now, is that ethically right? You think Time Warner wants to hear about that? What I'm telling you right now is some serious, serious allegations, but these guys here try to make it seem like I'm the bad guy and Lou is probably whispering stuff around, too, probably, but he probably isn't saying

> anything openly. And that influence can hurt me when I get to HBO, being friends with the people over there.

(PX 35). He also told Kim, as quoted in the article:

> Why let the cat out of the bag now? What's on my mind? What's on my mind is that if anybody has influence behind the scenes about Bernard Hopkins crossing Lou DiBella, they've got to understand that it was me taking out of my career before I even fought Trinidad, that paid to get on a card. Was the money wired, or the checks sent prior, yeah, that was a way of not being discovered. The bottom line is, where did the $50,000 come from? It wasn't a gift. I didn't know him that well to give him $50,000. Way before he started establishing his relationship with me as far as an advisor. So what I'm saying is that every time Lou DiBella did something for Bernard Hopkins or played a role for Bernard Hopkins, even when he was with HBO, he got paid.

(*Id.*). He also said the following, as quoted by Kim:

> The bottom line is, I'm not in litigation with Don King, but I may be with someone else. . . . Because I can tell you right now, I can back up every damn thing I'm saying and it's going to make certain people who are wrong run under the covers and wish I never said it. Because other people are going to ask questions and they're going to start digging.

(*Id.*).

DiBella read the article, and he described his reaction to the jury as follows:

> It was devastating to me. It was one of the hardest things I ever read. I also thought Bernard was not just a client. I thought we were actually friends so that really blew me away that someone would try to destroy me with a lie, that someone would try to destroy me like this. I could have lived with being thrown out of the equation. I could have lived with him just unceremoniously dumping me. I am not a little kid but to attack everything that I am, to attack my integrity, to say I am a crook, it killed me.
>
> . . . .
>
> [In the days and weeks and months that followed] I felt to an extent like I had been walking around with a scarlet letter. Here is another bad guy in boxing and I have never been another bad guy in boxing. And it's a very serious allegation when someone says you took a bribe, you sold a date. Never did I do this, and I had done all good for Bernard Hopkins, all good for Bernard Hopkins. And when I read that I was ripped apart, and I am still ripped apart . . . .

(Tr. 434).

Statements similar to the statements quoted in the Kim article were published in other newspapers and on the radio, attributed to Hopkins.

## B. Prior Proceedings

This action was commenced by DiBella and DiBella, Inc. on December 21, 2001. The original complaint asserted claims for libel, breach of contract, and quantum meruit. The breach of contract claim was dropped, and an additional libel claim was added based on a radio inter-

view that Hopkins gave to the ESPN Radio Network after the action was started.

The case was tried to a jury from November 4 to 19, 2002. The jury was asked to decide four libel claims – based on statements made by Hopkins as reported in the Kim article and two other articles and on ESPN radio – and the quantum meruit claim. The jury found in favor of DiBella on the libel claim based on the Kim article, awarding DiBella $110,000 in compensatory damages and $500,000 in punitive damages. The jury found in favor of Hopkins on the remaining libel claims as well as the quantum meruit claim.

Judgment was entered accordingly. These motions followed.

## DISCUSSION

### A. Hopkins's Motion

Hopkins moves for judgment as a matter of law or for a new trial on four grounds: (1) the jury's verdict finding libel as to the Kim article was inconsistent with its findings of no liability with respect to the other publications; (2) DiBella failed to prove falsity and actual malice as to the Kim article by clear and convincing evidence; (3) the evidence did not support the jury's award of punitive damages; and (4) the Court erred in two evidentiary rulings. I address each ground in turn.

#### 1. The Consistency of the Verdicts

Hopkins's inconsistent verdicts argument is rejected, for the following two reasons.

First, Hopkins has waived the argument, for he did not object to the verdicts as being inconsistent or otherwise raise the issue before the jury was excused. (Tr. 1533). By failing to raise the issue while the jury was still empaneled, Hopkins waived the objection. *See Laborde v. City of N.Y.*, No. 93 Civ. 6923, 1999 WL 38253, at *7 (S.D.N.Y. Jan. 27, 1999) ("An objection to inconsistent verdicts raised for the first time in a post-trial motion is untimely and procedurally barred."); *see also Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 54 (2d Cir. 1992). If the issue had been raised before the jury was discharged, the jury could have been asked to address any purported inconsistencies and to clarify or reconsider the verdicts. *See Trinidad v. Am. Airlines, Inc.*, No. 93 Civ. 4430, 1997 WL 79819, at *2 (S.D.N.Y. Feb. 25, 1997). It is too late for Hopkins to complain now.

Second, even assuming Hopkins did not waive the objection, the verdicts are not necessarily inconsistent and instead can be reconciled. *See, e.g., Harris v. Niagra Mohawk Power Corp.*, 252 F.3d 592, 598 (2d Cir. 2001) (holding that court "must adopt a view of the case, if there is one, that resolves any seeming inconsistency") (internal quotations and citations omitted); *Velez v. Goldco Indus., Inc.*, No. 00 Civ. 9704, 2002 WL 31164364, at *2 (S.D.N.Y. Sept. 30, 2002). The Kim article was accompanied by an audiotape of the actual interview that Kim conducted of Hopkins, and Kim testified himself. As discussed further below, the jury could hear Hopkins's statements in his own voice and words. They heard from Kim as well, and Kim was the only reporter of the reporters in question to testify. The jury thus had a more substantial basis on which to find falsity and actual malice. Although the ESPN interview was also on audiotape, the statements

were different and Hopkins's explanation for his comments was one that the jury could have accepted – that *he* was asking questions of the reporter. (*See* Tr. 786-89 (Hopkins testifying that he was asking the ESPN reporter whether the reporter thought DiBella's conduct was criminal)).

Accordingly, the inconsistent verdict argument is rejected.

## B. The Sufficiency of the Evidence of Liability

Hopkins argues that the evidence did not support the jury's findings as to either falsity or actual malice. I address each area separately.

### 1. Falsity

Hopkins's contention that DiBella did not present clear and convincing evidence of falsity is plainly wrong. The jury's finding that Hopkins's statements, as published in the Kim article, were false was well supported by the evidence.

Hopkins told Kim that "every time I fought . . . , Lou DiBella got paid, even when he was with HBO, which is f**king wrong." He said that "the bottom line is, the Syd Vanderpool fight, should an HBO employee accept $50,000 while he's still working for HBO?" He said:

> [I]t was me taking out of my career before I even fought Trinidad, that paid to get on a card. Was the money wired, or the checks sent prior, yeah, that was a way of not being discovered. The bottom line is, where did the $50,000 come from? It wasn't a gift. I didn't know him that well to give him $50,000. Way before he started establishing

> his relationship with me as far as an advisor. So what I'm saying is that every time Lou DiBella did something for Bernard Hopkins or played a role for Bernard Hopkins, even when he was with HBO, he got paid.

(PX 35). Hence, Hopkins was saying that he paid DiBella every time DiBella did something for him, and in particular that he paid DiBella $50,000 when DiBella was still employed by HBO so that he could fight Vanderpool on the Jones-Hall undercard. He was saying that he paid the $50,000 to DiBella long before the two started a relationship as boxer-advisor. Clearly, he was saying in substance that he bribed DiBella by paying him $50,000 when he was still employed at HBO so that he could fight Vanderpool on HBO.

DiBella presented substantial – indeed, clear and convincing – evidence to show that these statements were false, including the following:

– DiBella denied, under oath, that he had solicited or was paid a bribe by Hopkins;

– DiBella testified that he and Hopkins agreed on a $50,000 fee for consulting, public relations, and marketing services DiBella was going to render after he left HBO, and that the agreement was reached in February 2000, after the Hopkins-Barbosa fight had been set and at a time when DiBella expected to be gone from HBO by the end of February;

– DiBella and Davis testified that it was Davis's idea, not DiBella's, to put Hopkins on the Jones-Hall undercard; although DiBella approved the undercard, Davis was the driving force;

– DiBella did not receive *any* money from Hopkins prior to May 12, 2000, when DiBella's employment with HBO was officially terminated; no checks were sent and no monies were wired "prior' to his departure[3];

– in fact, DiBella loaned Hopkins $30,000, without interest, for training expenses, in late March or early April 2000; hence, instead of taking money from Hopkins, DiBella gave money to Hopkins;

– Hopkins did not repay the $30,000 loan until six days after the Vanderpool fight, seven days after DiBella's employment with HBO had ended;

– the $50,000 fee for services rendered was not paid by Hopkins to DiBella until January 2001, months after DiBella had left HBO;

– DiBella disclosed to HBO both his relationship with Hopkins and the loan that he had made to Hopkins; it is highly unlikely that he would have made these disclosures had he solicited a bribe from Hopkins to get him on HBO; and

– the record contained substantial evidence that Hopkins's story was simply not true.

The jury accepted DiBella's testimony and the testimony of DiBella's witnesses, and this testimony constitutes clear and convincing evidence that Hopkins's statements were false.

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[3] Although his testimony was far from clear, even Hopkins seemed to acknowledge at trial that no monies were actually wired or sent to DiBella prior to his departure from HBO. (*See* Tr. 780-82).

Hopkins argues now, in his post-trial motion, that the "essence" of his comments to Kim was that DiBella was "fairly compensated for whatever benefits he ever conferred upon" Hopkins and that Hopkins was merely questioning the ethics of DiBella's negotiating a $50,000 fee while still employed at HBO. (Def.'s Mem. at 19-20). But this is not what Hopkins said to Kim in the interview. He did not merely question DiBella's ethics or suggest that he had already been fairly compensated. He accused DiBella of soliciting and accepting an under-the-table payment or, indeed, a bribe. Moreover, to the extent the statements were arguably ambiguous, the jury interpreted the statements and took them to mean that Hopkins was accusing DiBella of soliciting and accepting an under-the-table payment from Hopkins while still employed at HBO.

The transcript of the complete interview eliminates any doubt. Revealing his shock at Hopkins's accusations, Kim says at one point: "What? So who did you have to give $50,000 to?" Hopkins responds: "Lou DiBella!" Kim answers back: "Really!?!" (PX 61 at 22). After Hopkins reiterates that he paid DiBella when DiBella was still at HBO, Hopkins asks Kim rhetorically: "Now what is that saying?" Kim responds: "That's saying he's taking money under the table." *(Id.* at 26). As Kim testified at trial, by giving that response he was confirming what he understood Hopkins to be saying. (Tr. 847). Hopkins did not contradict Kim's characterization of what he was saying, and confirmed that Kim had understood him correctly. (*Id.* 846-47).

Hence, the jury's finding of falsity was supported by clear and convincing evidence.

**2. Malice**

Hopkins also argues that the jury's finding that Hopkins published the statements with actual malice, *i.e.*, with knowledge that they were false or with reckless disregard for their truth or falsity (*see* Tr. 1480), was not supported by clear and convincing evidence. The argument is rejected.

The record contains ample evidence that Hopkins knew his statements to Kim were false or, at minimum, that he acted with reckless disregard for the truth, including the evidence of falsity discussed above. Given the substance of the statements – DiBella demanded and received an under-the-table payment of $50,000 while he was still employed at HBO – Hopkins had to have known the statements were false. Again, Hopkins knew or should have known that no monies were wired or checks sent "prior" to DiBella's departure from HBO, and Hopkins knew or should have known that DiBella did not solicit the money to arrange to put or keep Hopkins on the Jones-Hall undercard on HBO.

Hopkins defended the case on the theory that his statements were true. He presented evidence that while he was meeting with his lawyers, Arnold Joseph and Scott Magargee, in their offices in Philadelphia on April 11, 2000, DiBella telephoned and demanded the $50,000 payment in return for keeping Hopkins on the card to be televised on HBO in May 2000. (*See* Tr. 31 (in opening, Hopkins's counsel arguing that DiBella demanded $50,000 on April 11, 2000 to keep Hopkins on the card to be televised on HBO), 1359 (in summation, Hopkins's counsel arguing that Hopkins, Joseph, and Magargee heard DiBella demand $50,000 payment in an April 11, 2000

telephone conversation, and that "the $50,000 payment was to get on that card")). The jury was presented with substantial evidence to show that this meeting and the telephone call never happened; in fact, as discussed below, the jury heard evidence to show that Hopkins did not meet with the lawyers on April 11, 2000, and further, that Hopkins and his lawyers tried to hide that evidence. By finding that Hopkins had fabricated this story, the jury surely had a basis for concluding that Hopkins knew his statements were false.

Hence, the jury's finding of malice was supported by clear and convincing evidence.

## C. Punitive Damages

Hopkins also argues that DiBella "did not demonstrate any basis for the award of punitive damages." (Def.'s Mem. at 28). He does not challenge the amount of the punitive damages award as excessive, but argues only that there was no basis for an award of punitive damages at all. (*Id.* at 28-29).

Of course, the "malice" required for an award of punitive damages is different from the "actual malice" standard required to prove libel – knowledge of falsity or reckless disregard for truth or falsity. The jury was charged that it could award punitive damages only if it found that Hopkins made his statements "maliciously," that is, "with deliberate intent to injure" or with "hatred, ill will, or spite" or with "wilful, wanton, or reckless disregard of [DiBella]'s rights." (Tr. at 1484-85).

The record contains substantial evidence to support the jury's finding that Hopkins acted with the requisite state of mind.

The transcript of the interview that Kim conducted of Hopkins shows unequivocally that Hopkins's intent was to use Kim to hurt DiBella. He says to Kim: "Now it's time to come out swinging." (PX 61 at 28). Indeed, Hopkins says to Kim: "I'm saying – so, so, so what I'm saying to you Steve, you gonna slay the fucking bastard!" (*Id.* at 32). Indeed, when these portions of the tape were played for Hopkins at trial, he testified as follows:

> Q. You were coming out swinging, correct?
>
> A. Yes.
>
> Q. And your goal was to, in effect, from a professional standpoint, kill Mr. DiBella in this business by what you were saying?
>
> A. They some strong words just telling the truth. That's what I was always told. Just tell the truth.
>
> Q. Let's play 61-11, (audiotape played)
>
> A. You said kill.
>
> Q. Well, what did you understand by the word slay?
>
> A. Well, from the boxing standpoint it means that you, you know, somebody come out and implicate something you have done, you go out and say it again. And whether it's slay, whether it's put the truth out there, that's just a figure of speech used in boxing. It's used all the time.

Q. Who was the M-F'er that you were going to slay?

A. Lou DiBella.

(Tr. 791-92).

The transcript also shows that Hopkins was intent on making sure that Kim used his actual words, as he says: "you use my words," "that's what you put in there," "Listen to what I just said – this is how you do it," and "let's be clear – and I'm going to keep repeating myself 'till you say 'Bernard, ok, I got it.'" (PX 61 at 23, 25, 30). Indeed, Kim, testified that he understood that Hopkins wanted him to write an article specifically containing Hopkins's allegations. (Tr. 845).

Hopkins's statements also show that he understood the seriousness of his statements. He tells Kim "but one thing that I'm gonna tell you – and it's gonna sum it up and it's gonna raise your God damn antennas when you put the phone down." (PX 61 at 19). Indeed, he explicitly acknowledges to Kim that these are "some serious, serious allegations." (*Id.* at 23).

Finally, the transcript also shows that Hopkins somehow believed he was safe from liability because he was making his statements to a reporter. He said to Kim during the interview: "you got the tape recorder, and you can't be held accountable for nothing, because you're protected by the Constitution of America." (*Id.* at 18). The jury could have reasonably found that Hopkins uttered false, serious allegations, with the intent to hurt DiBella, erroneously believing that he would be insulated from liability because the allegations would be published by a reporter protected by the First Amendment.

The tape, together with all the evidence in the record, provided a more than sufficient basis to support the jury's award of punitive damages.

D. The Evidentiary Rulings

Hopkins argues that the Court erred in (1) excluding the testimony of his proposed expert witness, W. Michael Hoffman, and (2) admitting evidence relating to the *America Presents* litigation. Both arguments are rejected.

Hoffman's proposed testimony was the subject of an in limine motion before trial. The parties briefed the issue and I ruled in a written decision. *See DiBella v. Hopkins*, No. 01 Civ. 11779 (DC), 2002 WL 31427362, at *3-4 (S.D.N.Y. Oct. 30, 2002). For the reasons stated therein, I believe that my decision to exclude the evidence was correct. *See Generally Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003) (excluding expert testimony).

Likewise, I believe my decision to allow evidence relating to the *America Presents* litigation was also correct. Joseph was a key witness at the trial in this case. DiBella presented concrete evidence from which the jury could find that Joseph had lied to the judge presiding over the *America Presents* litigation – a case that had been filed in federal court in Denver. Moreover, the statements by Joseph related to the issues presented here – Joseph represented to the judge there that DiBella had no relationship with Hopkins, when that was not so. Magargee was present when Joseph made the representations, and thus this evidence bore on his credibility as well. These circumstances provided Joseph and Magargee with a motive to lie, as a jury verdict in favor of DiBella on his quantum meruit claim would have been wholly at odds

with Joseph's representation to the *America Presents* court. DiBella was entitled to present this evidence relating to Joseph's and Magargee's bias, motive, and credibility to the jury. This issue was discussed at a pretrial proceeding on October 28, 2002, and my reasoning, as articulated on the record that day, stands. (*See* 10/28/02 Tr. 11-23).

Hence, this prong of Hopkins's motion is denied as well.

## E. DiBella's Motion

Plaintiffs move for sanctions, a new trial, and an amended judgment. Because the first two prongs of the motion are based on purportedly improper conduct by Hopkins and his counsel in this case, I address those two prongs together before I proceed to the request for an amended judgment.

### 1. The Misconduct of Hopkins and His Attorneys

Plaintiffs seek sanctions pursuant to 28 U.S.C. § 1927 and this Court's inherent power. DiBella also seeks a new trial on all libel counts as to which the jury did not find in his favor. Both requests are based on conduct that I agree was highly improper.[4]

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[4] Plaintiffs also seek sanctions based on the prior conduct of Hopkins and his attorneys in the case, including Hopkins's attorneys' purportedly "obstructionist" conduct at his deposition and their filing of a purportedly frivolous summary judgment motion. I denied plaintiffs' prior motion for sanctions in these respects, *see DiBella v. Hopkins*, No. 01 Civ. 11779 (DC), 2002 WL 31357812, at *3 (S.D.N.Y. Oct. 18, 2002),

(Continued on following page)

a) Facts

Based on the record before me, I make the following findings of facts:

The critical factual issue in the case was whether DiBella, while still employed at HBO, solicited a $50,000 bribe or under-the-table payment from Hopkins to put him on the card to be televised on HBO in May 2000. This was the crux of the statements Hopkins had made to Kim and others.

At trial, the parties offered two wholly conflicting scenarios in this respect: DiBella denied the allegation and testified that although he did enter into an agreement with Hopkins, he did so in February 2000 based on his expectation that he would be leaving HBO shortly, and that he would then provide Hopkins with services in return for a $50,000 fee. According to DiBella, the agreed-upon fee had nothing to do with the fight in May. In contrast, Hopkins, Joseph, and Magargee testified that DiBella solicited a $50,000 payment from Hopkins during a telephone call on April 11, 2000, when Hopkins, Joseph, and Magargee were meeting at the lawyers' offices in Philadelphia, in return for arranging for Hopkins to be or remain on the card in May. At trial, Hopkins's lead attorney, Robert W. Hayes, made the latter assertion both in his opening statement and in his summation.

At trial, Hopkins called Magargee as a witness. Magargee testified on direct examination, by Hayes, in substance as follows:

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and I decline to revisit these matters now. I focus here on the issues raised by Hopkins's attorneys' handling of the time sheet.

In April 2000, he and Joseph were meeting with Hopkins in their Philadelphia offices to prepare for the *America Presents* trial. (Tr. 1127, 1129). Magargee walked into a conference room where Joseph and Hopkins were already meeting, and DiBella was on the speaker phone. (*Id.* 1129). He heard DiBella discussing the undercard for a Roy Jones fight in the middle of May 2000. He then heard DiBella say that "he could get or could convince HBO to get Bernard on that undercard" and that "his fee in connection with that" would be $50,000. (*Id.* 1130).

Hayes then showed Magargee Defendant's Exhibit 75, a redacted portion of Magargee's time sheet for April 11, 2000. (*Id.* 1130, 1133-34). The entry in question, for work Magargee had done on the *America Presents* case, read as follows:

> REVISIONS TO L. DI BELLA AFFIDAVIT, DISCUSSIONS WITH A. JOSEPH, CALLS WITH L. DI BELLA, MEETING WITH D. ELBAUM TO DISCUSS TESTIMONY

(DX 75). Hayes confirmed with Magargee that part of the time sheet had been "redacted, blocked out to protect the privileges that might apply." (Tr. 1133). Hayes then asked leading questions to bolster Magargee's testimony that the critical telephone conversation had occurred on April 11, 2000:

> Q. Is this to mainly pinpoint the date on which you had the conversation with Mr. DiBella about – does this allow you to pinpoint the date in which you heard the conversation about the Vanderpool fight and payment of $50,000?
>
> A. Yes. It would be April 11th of 2000.

> Q. Again, just so the record is clear, how can you draw the conclusion from that time [sheet] that that's the day it happened?
>
> A. Based upon the documents that related to the preparation of the affidavit and the time when this occurred prior to trial in the week prior to trial, that that was my recollection as to when it occurred.

(Tr. 1134). Hence, Hayes were [sic] seeking to use the time sheet to corroborate Magargee's testimony that the purported April 11, 2000 telephone conversation with DiBella occurred.

On cross-examination, DiBella's counsel, Judd Burstein, quite properly sought to question Magargee on the time sheet. In particular, although Magargee testified that he met with Hopkins and Joseph in person on April 11, 2000, the redacted time sheet does not indicate that there was any meeting with Hopkins on that date. (*See* DX 75). When Burstein asked the question, however, Hayes objected:

> [By Mr. Burstein]
>
> Q. You will agree, sir, that there is nothing in your billing record that suggests that you met with Bernard Hopkins on April 11th?
>
> MR. HAYES: Objection. It's been redacted.
>
> MR. BURSTEIN: Oh, that's – I would like a sidebar on that, your Honor.
>
> THE COURT: That objection is overruled and the jury should disregard it. That – really.
>
> If there is something here about Mr. Hopkins being present it should be there.

(Tr. 1164). Hayes's objection was improper, for he was suggesting to the jury that there had been a reference to a meeting with Hopkins, and that the reference had been redacted.

I immediately held a sidebar. Hayes denied what he had just said, as he asserted: "I didn't say it was redacted." (*Id.* 1165). Of course, he had made that very statement. (*See id.* 1164 ("MR. HAYES: Objection. It's been redacted.")). The following colloquy ensued, outside the presence of the jury:

> MR. BURSTEIN: . . . I think it's important that the court let the jury know that there is nothing in that time record reflecting a meeting with –
>
> MR. HAYES: I don't know whether there is or isn't.
>
> THE COURT: I don't know whether there is but I would guess that if there were something that that would be –
>
> MR. HAYES: if its relating to this meeting it certainly would have been there. I put everything in there. I don't understand.

(*Id.* 1166).

Burstein asked for an instruction, and I gave the jury the following instruction:

> THE COURT: Ladies and gentlemen, let me just explain something. You have before you Defendant Exhibit 75 and you see in the far right column there is a narrative. This is a description that Mr. Magargee wrote to describe what he did that day. You can tell that certain things have been whited out. Those things were whited out

> because Mr. Hopkins and his lawyers asked that they be whited out on the grounds that this contained privileged information that was unrelated to this particular case. Maybe it had something to do with America Presents, I don't know. But the argument was that it should be whited out . . . because it does not have anything to do with this case and Mr. Burstein does not know what was whited out because it was whited out by Cozen O'Connor before it was produced.
>
> One would think that if Mr. Hopkins was present at a meeting that that would be in the narrative. And that is the point that Mr. Burstein was trying to make. And Mr. Hayes objected on the grounds that that had been redacted.
>
> Now, I thought that is what Mr. Hayes said and if that is not what he intended, that is fine.

(*Id.*, 1166-67). My instruction was interrupted, as Hayes requested another sidebar. I then finished my instruction to the jury:

> THE COURT: Let me finish my instruction.
>
> . . . .
>
> So Mr. Burstein's point that he was trying to make, and it's up to you to decide whether he makes it or not, but the point he was trying to make was that if Mr. Magargee had met with Mr. Hopkins, that he would have listed or he would have said meeting with Mr. Hopkins. It's of course possible that Mr. Magargee just didn't write down Mr. Hopkins' name. That is one possibility.
>
> Mr. Burstein would argue that Mr. Hopkins' name is not listed because he wasn't there. It's

> up to you to decide whether Mr. Magargee is telling the truth or not. When Mr. Hayes stood up and objected on the grounds that there might have been a redaction that referred to Mr. Hopkins being there, I have sustained the objection. I am instructing you to disregard that comment because if there was an entry that says that Mr. Hopkins is there that should have been included in what was produced. That should not have been whited out. And, again, it's up to you to consider all of this together with all of the evidence in the case.

(*Id.* 1170-71). I ordered Hayes to submit the unredacted time sheet for *in camera* review. (*Id.* 1172).

The unredacted time sheet was submitted to the Court *in camera*, and the full, unredacted narrative reads as follows:

> PREPARATION FOR TRIAL – DRAFTING OF MOTIONS IN LIMINE, REVISIONS TO L. DI BELLA AFFIDAVIT, DISCUSSIONS WITH A. JOSEPH, CALLS WITH L. DI BELLA, MEETING WITH D. ELBAUM TO DISCUSS TESTIMONY, PREPARATION OF WITNESS OUTLINES, SENDING OF SECOND SUBPOENA TO HBO FOR DI BELLA, CALLS WITH B. HOPKINS

(CX 1). The redacted portions are underscored. Significantly, Hopkins's attorneys redacted the last entry; "CALLS WITH B. HOPKINS." Of course, that entry contradicted the testimony that Magargee and Joseph had *met* with Hopkins in Cozen O'Connor's Philadelphia offices on that day, for if Hopkins had been present there would have been no need for telephone calls with him. The absence of any reference to a meeting together with the

references to telephone calls constituted strong evidence that Hopkins was not present and that no meeting occurred.

Unfortunately, I did not see the unredacted time sheet until after Hayes had given his summation and Burstein had started his summation. As soon as I noticed the entry to "CALLS WITH B. HOPKINS," however, I interrupted Burstein's summation and saw counsel at a sidebar:

> THE COURT: I was just handed the unredacted version and I am extremely, extremely troubled by this because i[t] says on it "Calls with B. Hopkins" and if Mr. Magargee is supposedly meeting with Mr. Hopkins why would he be calling him?

(Tr. 1412, *see id.* 1411). I showed the unredacted time sheet to counsel, and Burstein asked that the record be reopened so that he could offer the unredacted time sheet into evidence. I granted his request. I explained to the jury that I had just then reviewed the unredacted time sheet, and that I was receiving the unredacted time sheet into evidence as Court Exhibit 1. (*Id.* 1412-14).

Burstein immediately published the exhibit to the jury and commented on it extensively, arguing to the jury that:

> Everything you need to know about Bernard Hopkins and the fraud he has tried to perpetrate upon you in this courtroom is encapsulated within this document. . . . There is nothing showing a meeting with Bernard Hopkins. And Mr. Hayes stood up before you and said "Objection, the document is redacted," suggesting to you that there was something on that document that would show a meeting.

> What does this document show, ladies and gentlemen? . . . It says, "calls with Bernard Hopkins." They hid from you the fact that there was no meeting with Bernard Hopkins the day that they say that there was a meeting, there were calls with Bernard Hopkins. If there were calls with Bernard Hopkins he wasn't in the office that day, there wasn't a conference call like they said it was.

(*Id.* 1414).

The next business day, while the jury was deliberating, I raised the issue of the time sheet with counsel. Hayes stated that it was his decision to redact the words in question. (*Id.* 1504). I asked what his basis was for redacting the words in question, and I observed that "on their face I don't see how they are privileged or how they relate to work product and on their face it seems to me they are relevant." (*Id.*). He gave a wholly unsatisfactory and unpersuasive answer. (*See id.* 1505-07; *see also id.* 1509-20).

In the end, the matter of Hayes's conduct was not resolved. The jury returned its verdict. This application followed.

### b) Conclusions

I consider whether Hopkins's attorneys engaged in improper conduct and, if so, what, if any, sanction to impose.

(i) **Was the Conduct Improper?**

In my view, Hopkins's attorneys, and in particular Hayes, engaged in improper conduct.

First, Hayes had no good faith basis for redacting the words "CALLS WITH B. HOPKINS" from the time sheet. Those words revealed no privileged communications or any substantive information at all. The entry revealed nothing as to the content of the telephone calls, and the fact that there were telephone calls was not privileged or otherwise protected from disclosure. *See, e.g., Renner v. Chase Manhattan Bank*, No. 98 Civ. 926 (CSH), 2001 WL 1356192, at *8 (S.D.N.Y. Nov. 2, 2001) (finding law firm's billing records not privileged where they gave "a relatively terse chronological recitation, and g[a]ve no details with respect to the contents of communications" between attorney and client); *P&B Marina, Ltd. v. Logrande*, 136 F.R.D. 50, 55-56 (E.D.N.Y. 1991) ("Billing records and hourly statements which do not reveal client communications are not privileged.").

Second, Hayes redacted the words "CALLS WITH B. HOPKINS" with the intent to mislead. I reach that conclusion because of the absence of any good faith basis for the redaction and because Hayes did not redact entries that disclosed *more* information. Indeed, he engaged in selective redaction. He clearly wanted to hide the information that would undercut Hopkins's position that the telephone call with DiBella occurred during a meeting of Hopkins and his lawyers on April 11, 2000, and yet he revealed information that he thought would be helpful.

Third, Hayes attempted to use the redacted time sheet in a misleading way. He knew the words "CALLS WITH B. HOPKINS" had been redacted, and yet he sought to use

the redacted time sheet to bolster Magargee's testimony, even though he knew that the redacted entry undercut the assertion that there was a meeting with Hopkins that day.

Fourth, Hayes's objection to Burstein's question on cross-examination was highly improper, for clearly it was intended to mislead the jury. When Burstein suggested that there was "nothing" in the time sheet about a meeting on April 11, 2000, Hayes objected, saying: "It's been redacted." Hayes was suggesting to the jury that there was a reference to such a meeting, but that "it" had been redacted. Even if Hayes's reference to "it" was to the time sheet itself rather than to any reference to a meeting, the import was the same: he was saying that Burstein's suggestion that the time sheet contained "nothing" about a meeting was improper because the time sheet had been redacted and any reference to such a meeting had been deleted. Hayes knew, of course, that there was no reference to a meeting, for he had done the redactions himself. To make matters even worse, not only was there no reference to a meeting, there was a reference to telephone calls that was inconsistent with the assertion of a meeting, and that reference had been redacted.

Hayes did all of these things in an effort to mislead DiBella, DiBella's attorneys, the Court, and the jury. Hence, he engaged in multiple layers of improper and inappropriate conduct.

### (ii) Should Sanctions Be Imposed?

Notwithstanding my views as to the propriety of Hayes's conduct, I will not impose sanctions or order a new trial. Ultimately, I do not believe that DiBella was injured

by Hayes's conduct. To the contrary, Burstein seized on the issue masterfully, to DiBella's benefit.

When Hayes made his improper objection, Burstein immediately asked for a curative instruction, and I gave one. Burstein's point was thereby highlighted for the jury: if there had been a meeting with Hopkins, that fact surely would have been noted in the time sheet, and the absence of such an entry was strong evidence that no meeting ever occurred.

Burstein was even more effective during his summation, when the unredacted time sheet finally surfaced. Without missing a beat, Burstein hammered the point that Hopkins and his lawyers had "hid" from the jury the fact that there was no meeting on April 11, 2000, and that this act of deception was part and parcel of the lies that Hopkins had attempted to perpetrate about DiBella. In the end, DiBella and his lawyers were able to rely on the unredacted time sheet, and they made the most of the opportunity. I do not believe that these proceedings were substantially "multiplied" or delayed because of Hayes's conduct. *See* 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Nor do I believe that DiBella was prejudiced, as Burstein was able to turn the improper conduct to DiBella's advantage. Finally, of course, the jury has already imposed punitive damages in the amount of $500,000.

Hence, DiBella's motion is denied to the extent he seeks sanctions and a new trial. Hayes's conduct, however, is still highly troubling and it cannot be ignored.

Accordingly, I will refer the matter of his conduct to the Court's Committee on Grievances.

**2. The Request for an Amended Judgment**

DiBella also requests an amended judgment that provides for interest at the C.P.L.R. rate of 9% per annum from the date the verdict was rendered through the date of an amended judgment, citing C.P.L.R. 5002 and 5004. Hopkins has not responded to this prong of the motion. Hence, the request is granted and an amended judgment will be entered accordingly.

## CONCLUSION

For the reasons set forth above, (1) Hopkins's motion for judgment as a matter of law or for a new trial is denied in all respects, and (2) plaintiffs' motion is denied to the extent it seeks sanctions and a new trial and it is granted to the extent it seeks the entry of an amended judgment to reflect the award of post-verdict interest. The matter of Hayes's conduct will be referred to the Court's Committee on Grievances.

SO ORDERED.

Dated: New York, New York
September 30, 2003

/s/
DENNY CHIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| LOU DIBELLA and DIBELLA ENTERTAINMENT, INC., Plaintiffs, -against- BERNARD HOPKINS, Defendant. | : | **MEMORANDUM DECISION** 01 Civ. 11779 (DC) |

**APPEARANCES:** JUDD BURSTEIN, P.C.
Attorneys for Plaintiffs
By: Judd Burstein, Esq.
Peter B. Schalk, Esq.
1790 Broadway, Suite 1701
New York, New York 10019

COZEN O'CONNOR
Attorneys for Defendant
By: Robert W. Hayes, Esq.
Mario Pagano-Kelleher, Esq.
Gary L. Leshko, Esq.
Theresa Brennan, Esq.
45 Broadway Atrium
New York, New York 10006-3792

**CHIN, D.J.**

In this diversity case, plaintiff Lou DiBella, a boxing advisor and matchmaker, and his company sue defendant Bernard Hopkins, the professional boxer, for defamation and to recover the reasonable value of services provided.

Hopkins moved for summary judgment before discovery was complete and even before plaintiffs were able to

take his deposition. Plaintiffs cross-moved to strike the answer on the grounds that Hopkins had not made himself available for deposition. After the deposition was taken, plaintiffs moved for sanctions on the basis that Hopkins's deposition testimony contradicted positions he had previously taken in the case. In turn, Hopkins cross-moved for sanctions on the basis that plaintiffs, sanctions motion was frivolous. For the reasons that follow, all four motions are denied.

The facts are summarized in this Court's decision denying Hopkins's motion to dismiss the first amended complaint for lack of personal jurisdiction and failure to state a claim upon which relief may be granted. *DiBella v. Hopkins*, 187 F. Supp. 2d 192 (S.D.N.Y. 2002). In particular, Hopkins's purportedly defamatory statements are quoted in the prior decision. 187 F. Supp. 2d at 195-96.

1. **The Summary Judgment Motion**

Hopkins's motion for summary judgment is denied.

First, the motion was clearly premature. It was filed before discovery was complete and even before plaintiffs were able to depose Hopkins. On this basis alone, the motion must be denied. *See Hellstrom v. U.S. Dep't of Veteran Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995); Fed. R. Civ. P. 56(f).

Second, genuine issues of material fact exist for trial, including the following:

**a) Hopkins's Intent**

Although Hopkins was equivocal in his earlier statements in the case, he made clear in his deposition that he uttered the words reported in the media. What remains sharply in dispute, however, is what he intended by his statements. He argues that his statements were true and that he was merely complaining that DiBella had solicited and obtained an agreement from Hopkins to pay him $50,000 while DiBella was still employed by HBO – that he was merely stating that it was unfair for DiBella to want to be paid by Hopkins when he was already earning a salary from HBO.

A reasonable jury could find that he intended far more. A reasonable jury could find that Hopkins intended to accuse DiBella of engaging in dishonest, unethical, and, indeed, criminal conduct. He told a Maxboxing.com reporter that "every time I fought, Lou DiBella got paid, even when he was with HBO, which is f**king wrong." He told the *Boston Globe*: "I got the evidence right here on my coffee table. The wire transfers. The voided check. . . . To get on that [HBO] card the fee was $50,000." He told the *Philadelphia Daily News*: "When the guy [DiBella] says, 'I got HBO dates, you give me this and I'll get you one,' what am I supposed to do? . . . But it got to be where [DiBella] wouldn't back off. Let the closet doors open and the skeletons will come out." He told the *Las Vegas Review-Journal*: "Lou Dibella . . . lobbied for HBO while he was there. . . . I paid him. I wired him $50,000." He spoke to ESPN Radio and asked himself rhetorical questions: "Hey, did you or did you not give $50,000 to an employee from HBO to be an undercard? Yes, I [did]. Do you have anything? Yes, I have. Here [it] is right here. Now, whatever you wanna take from, well, you know that's criminal, right?" *DiBella*

*v. Hopkins*, 187 F. Supp. 2d at 195-96. Certainly a reasonable jury could find that Hopkins, in uttering these words, intended to accuse DiBella of demanding payoffs, soliciting bribes, and violating his obligations to HBO.

Hopkins argues that he was merely giving an opinion when he made his statements to the media, noting that statements of subjective opinion are not actionable. As I held in denying the motion to dismiss, however, Hopkins's statements were statements of fact, with precise and readily understood meanings. At a minimum, a reasonable jury could surely find that the statements were statements of fact rather then subjective opinion, and that Hopkins intended to state, as a factual matter, that DiBella had acted improperly, unethically, and criminally.

b) Truth

Genuine issues of material fact exist as to the truthfulness of Hopkins's statements that he paid DiBella $50,000 to get him fights on HBO. In particular, Hopkins contends that he paid DiBella $50,000, while DiBella was still employed at HBO, to get him the Syd Vanderpool fight on the undercard for the Roy Jones fight that was broadcast on HBO on May 13, 2000.

DiBella concedes that he negotiated an agreement from Hopkins to pay him $50,000, but he puts a different light on the situation. He explains that in the fall of 1999, he had decided, for personal and professional reasons, to leave HBO, where he had been serving as Senior Vice President for Programming. He began negotiating a severance package with HBO and the negotiations took longer than the parties had anticipated. Although he had originally envisioned leaving in early 2000, his severance

agreement was not signed until May 2000. In the first few months of 2000, DiBella continued to do work for HBO, but only sporadically, as both he and HBO were making the transition to his departure. According to DiBella – and the record contains evidence to support his position – HBO agreed that DiBella could start trying, even while he was still technically an HBO employee, to recruit fighters to work with his anticipated new business. Moreover, according to DiBella, HBO agreed, as part of DiBella's severance package to give him a number of "dates" that he could make available for fighters to appear on HBO broadcasts.

It was in this context, according to DiBella, that he began recruiting Hopkins to be a client for his new company. DiBella contends that he negotiated an initial agreement from Hopkins to pay $50,000 for general services and advice that he was going to provide Hopkins through his new business. As to Hopkins's allegation that he paid $50,000 to DiBella to get the Vanderpool fight on HBO, DiBella denies the allegation, noting that this was *not* one of the "dates" given to him by HBO as part of his severance package and that HBO had wanted to put Hopkins on the undercard for the Jones fight independently of any effort made by him.

If DiBella is telling the truth, his conduct was not wrong or inappropriate and Hopkins's statements to the contrary were false. Obviously, this is a genuine issue that can be resolved only at trial.

c) **The Timing of the $50,000 Payment**

A genuine issue of fact also exists as to the timing of the $50,000 payment. In his statements to the media, Hopkins stated that he paid $50,000 to DiBella while

DiBella was still employed by HBO. Hopkins now takes the position that he was merely stating that DiBella solicited the $50,000 while he was at HBO, but that the actual payment was made later. In fact, Hopkins now concedes that the $50,000 was not paid to DiBella until January 8, 2001. (Def. Mem. in Support of Summary Judgment Motion at 23), months after DiBella left HBO. A jury must decide what Hopkins actually said with respect to the timing of the $50,000, what he meant by what he said, and whether any discrepancy is significant.

Although the parties agree that there was a delay in the payment of the $50,000, they disagree as to the reason for the delay. Hopkins contends that DiBella wanted to delay the payment to avoid any appearance of impropriety resulting from DiBella's acceptance of the payment while still employed at HBO. DiBella contends that Hopkins's lawyer requested the delay because DiBella had given deposition testimony favorable to Hopkins in unrelated litigation, and the lawyer wanted to avoid the possible appearance of impropriety that would result from paying $50,000 to a witness. This is another factual dispute for the jury.

**d) <u>The Reasonable Value of Plaintiffs' Services</u>**

Finally, genuine issues for trial exist with respect to plaintiffs' quantum meruit claim, including whether plaintiffs expected to be paid for services they rendered and the reasonable value of those services. Plaintiffs have presented evidence from which a reasonable jury could find that they are entitled to recover from Hopkins on a quantum meruit basis.

**2. The Sanctions Motions**

All three sanctions motions are denied. Hopkins's summary judgment motion was ill-advised on the merits and suspicious in its timing. Nonetheless, I will not impose sanctions.

## CONCLUSION

Hopkins's motion for summary judgment is denied, as are the three motions for sanctions. Trial of this action will commence on November 4, 2002, at 10 a.m., as previously scheduled.

**SO ORDERED.**

Dated: New York, New York
October 16, 2002

/s/ Denny Chin
DENNY CHIN
United States District Judge

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

## MOTION INFORMATION STATEMENT

**Docket Number(s):** 03-7012(L); 03-9094 (CON), 03-9095 (XAP)

**Motion for:** COSTS

Set forth below precise complete statement of relief sought:

Grant Plaintiff-Appellant-Cross-Appellee's Bill of Costs and award him full costs as set forth in his motion.

Caption [use short title]

LOU DIBELLA and DIBELLA ENTERTAINMENT, INC.
*Plaintiffs-Appellants-Cross Appellees,*

– against –

BERNARD HOPKINS,
*Defendant-Appellee-Cross-Appellant.*

– and –

ROBERT W. HAYES, ESQ.,
*Cross-Appellant.*

**MOVING PARTY:** Lou Dibella, DiBella Entertainment, Inc.

☐ Plaintiff ☐ Defendant
☒ Appellant/ Petitioner ☐ Appellee/ Respondent

**MOVING ATTORNEY:**

[name of attorney, with firm, address, phone number and e-mail]

**OPPOSING PARTY:** Bernard Hopkins and Robert W. Hayes, Esq.

**OPPOSING ATTORNEY [Name]:**

[name of attorney, with firm, address, phone number and e-mail]

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Hinshaw & Culberston
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New York, New York
212-471-6200

Court-Judge/Agency appealed from: _____

**Please check appropriate boxes:**

Has consent of opposing counsel:

A. been sought?
☐ Yes ☒ No

B. been obtained?
☐ Yes ☒ No

Is oral argument requested?
☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?
☐ Yes ☐ No

If yes, enter date Appeal argued on Sept. 27, 2004

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below?
☐ Yes ☐ No

Has this relief been previously sought in this Court?
☐ Yes ☐ No

Requested return date and explanation of emergency:

N/A

Signature of Moving Attorney:

/s/ Matthew G. DeOreo Date: 4/18/05

Has service been effected? [Attach proof of service]
☒ Yes ☐ No

**ORDER**

Before: Hon. Richard J. Cardamone, Hon. Joseph M. McLaughlin, Hon. Richard C. Wesley, *Circuit Judges*

IT IS HEREBY ORDERED that the motion is granted; costs are taxed in the amount of $6,518.50 in favor of plaintiff-appellant-cross-appellee, Lou DiBella, DiBella Entertainment, Inc.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

5/16/05
Date

by /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**THURGOOD MARSHALL U.S. COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

**Roseann B. MacKechnie**
**CLERK**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 1st day of June two thousand five.

03-7012-cv (L)

DIBELLA v. HOPKINS

(Filed Jun. 1, 2005)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee-Cross-Appellant Bernard Hopkins. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ [Illegible]
Motion Staff Attorney

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

## MOTION INFORMATION STATEMENT

| | Caption [use short title] |
|---|---|
| **Docket Number(s):** 03-7012(L); 03-9095(XAP) | LOU DIBELLA and DIBELLA ENTERTAINMENT, INC. Plaintiff-Appellant-Cross Appellees, v. BERNARD HOPKINS, Defendant-Appellee-Cross-Appellant. |
| **Motion for:** To stay Issuance of Mandate | |
| Set forth below precise complete statement of relief sought: Stay issuance of the mandate pending the filing of a writ of certiorari | |
| **Moving Party:** Bernard Hopkins ☐ Plaintiff ☒ Defendant ☒ Appellant/ Petitioner ☐ Appellee/ Respondent | **Opposing Party:** Lou DiBella |
| **Moving Attorney:** Gary L. Leshko [name of attorney, with firm, address, phone number and e-mail] | **Opposing Attorney:** Judd Burstein [name of attorney, with firm, address, phone number and e-mail] |

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Judd Burstein
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Court-Judge/Agency appealed from: United States District Court for the Southern District of New York; Honorable Denny Chin

**Please check appropriate boxes:**

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Is oral argument requested? ☐ Yes ☒ No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☒ Yes ☐ No

If yes, enter date Already held

Signature of Moving Attorney:

/s/Gary L. Leshko Date: 6/7/05

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below? ☐ Yes ☒ No

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:

Has service been effected? ☒ Yes ☐ No

[Attach proof of service]

**ORDER**

Before: Hon. Richard J. Cardamone, Hon. Joseph M. McLaughlin, Hon. Richard C. Wesley, *Circuit Judges*

IT IS HEREBY ORDERED that the motion is GRANTED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

6/29/05
Date

by /s/ Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney